



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

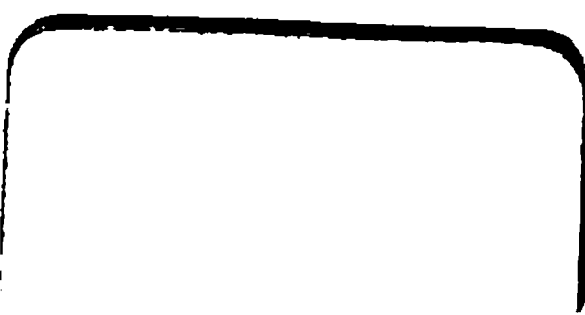
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



THE
AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

**SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"**

DECIDED IN THE

**COURTS OF LAST RESORT
OF THE SEVERAL STATES.**

SELECTED, REPORTED, AND ANNOTATED

**BY A. C. FREEMAN,
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."**

VOL. XXXIV.

**SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY,
LAW PUBLISHERS AND LAW BOOKSELLERS,
1894.**

121860

**Entered according to Act of Congress in the year 1894,
By BANCROFT-WHITNEY COMPANY,
In the Office of the Librarian of Congress, at Washington.**

**SAN FRANCISCO:
THE FILMER-ROLLINS ELECTROTYPE COMPANY,
TYPOGRAPHERS AND STEREOTYPERS.**

AMERICAN STATE REPORTS.

VOL. XXXIV.

SCHEDULE

showing the original volumes of reports in which the cases herein selected and re-reported may be found, and the pages of this volume devoted to each state.

	PAGE.
FLORIDA REPORTS Vol. 81.	17-48
ILLINOIS REPORTS Vol. 142.	49-108
KANSAS REPORTS Vol. 50.	107-161
KENTUCKY REPORTS Vol. 91.	162-249
MASSACHUSETTS REPORTS Vol. 157.	250-317
MICHIGAN REPORTS Vol. 94.	318-371
MISSOURI REPORTS Vol. 112.	372-430
NEW YORK REPORTS Vol. 138.	431-472
NORTH CAROLINA REPORTS Vol. 112.	473-530
OHIO STATE REPORTS Vol. 49.	531-594
PENNSYLVANIA STATE REPORTS . . Vols. { ^{149, 152,} 153. }	595-725
SOUTH CAROLINA REPORTS Vol. 87.	726-776
TEXAS REPORTS Vol. 85.	777-838
WASHINGTON REPORTS Vol. 5.	839-898

SCHEDULE

**SHOWING IN WHAT VOLUMES OF THIS SERIES THE CASES
REPORTED IN THE SEVERAL VOLUMES OF OFFICIAL
REPORTS MAY BE FOUND.**

State reports are in parentheses, and the numbers of this series in bold-faced figures.

ALABAMA. — (83) 3; (84) 5; (85) 7; (86) 11; (87) 12; (88) 16; (89) 12; (90, 91) 24; (92) 25; (93) 30; (94) 33.

ARKANSAS. — (48) 3; (49) 4; (50) 7; (51) 14; (52) 20; (53) 23; (54) 26; (55) 29.

CALIFORNIA. — (72) 1; (73) 3; (74) 5; (75) 7; (76) 9; (77) 11; (78, 79) 13; (80) 13; (81) 15; (82) 16; (83) 17; (84) 18; (85) 20; (86) 21; (87, 88) 22; (89) 23; (90, 91) 25; (92, 93) 27; (94) 28; (95) 29; (96) 31; (97) 33.

COLORADO. — (10) 3; (11) 7; (12) 13; (13) 16; (14) 20; (15) 23; (16) 25; (17) 31.

CONNECTICUT. — (54) 1; (55) 3; (56) 7; (57) 14; (58) 18; (59) 21; (60) 25; (61) 29.

DELAWARE. — (5 Houst.) 1; (6 Houst.) 22.

FLORIDA. — (22) 1; (23) 11; (24) 13; (25, 26) 23; (27) 26; (28) 29; (29) 30; (30) 32; (31) 34.

GEORGIA. — (76) 2; (77) 4; (78) 6; (79) 11; (80, 81) 12; (82) 14; (83, 84) 20; (85) 21; (86) 22; (87) 27; (88) 30; (89) 32.

ILLINOIS. — (121) 2; (122) 3; (123) 5; (124) 7; (125) 8; (126) 9; (127) 11; (128) 15; (129) 16; (130) 17; (131) 19; (132) 22; (133, 134) 23; (135) 25; (136) 29; (137) 31; (138, 139) 32; (140, 141) 33; (142) 34.

INDIANA. — (112) 2; (113) 3; (114) 5; (115) 7; (116) 9; (117, 118) 10; (119) 12; (120, 121) 16; (122) 17; (123) 18; (124) 19; (125) 21; (126, 127) 22; (128) 25; (129) 28; (130) 30; (131) 31; (132) 32.

IOWA. — (72) 2; (73) 5; (74) 7; (75) 9; (76, 77) 14; (78) 16; (79) 18; (80) 20; (81) 25; (82) 31; (83) 32.

KANSAS. — (37) 1; (38) 5; (39) 7; (40) 10; (41) 13; (42) 16; (43) 19; (44) 21; (45) 23; (46) 26; (47) 27; (48) 30; (49) 33; (50) 34.

KENTUCKY. — (83, 84) 4; (85) 7; (86) 9; (87) 12; (88) 21; (89) 25; (90) 29; (91) 34.

LOUISIANA. — (39 La. Ann.) 4; (40 La. Ann.) 8; (41 La. Ann.) 17; (42 La. Ann.) 21; (43 La. Ann.) 26; (44 La. Ann.) 32.

MAINE. — (79) 1; (80) 6; (81) 10; (82) 17; (83) 23; (84) 30.

MARYLAND. — (67) 1; (68) 6; (69) 9; (70) 14; (71) 17; (72) 20; (73) 25; (74) 28; (75) 32.

MASSACHUSETTS. — (145) 1; (146) 4; (147) 9; (148) 12; (149) 14; (150) 15; (151) 21; (152) 23; (153) 25; (154) 26; (155) 31; (156) 32; (157) 34.

- MICHIGAN.** — (60, 61) 1; (62) 4; (63) 6; (64, 65) 8; (66, 67) 11; (68, 69, 70) 13; (70) 14; (71, 76) 15; (72, 73, 74) 16; (77, 78) 18; (79) 19; (80) 20; (81, 82, 83) 21; (84) 22; (85, 86, 87) 24; (88) 26; (89) 26; (90, 91) 20; (92) 21; (93) 22; (94) 24.
- MINNESOTA.** — (36) 1; (37) 5; (38) 8; (39, 40) 12; (41) 16; (42) 18; (43) 19; (44) 20; (45) 22; (46) 24; (47) 28; (48) 31; (49) 32.
- MISSISSIPPI.** — (65) 7; (66) 14; (67) 19; (68) 24; (69) 20.
- MISSOURI.** — (92) 1; (93) 3; (94) 4; (95) 6; (96) 9; (97) 10; (98) 14; (99) 17; (100) 18; (101) 20; (102) 22; (103) 23; (104, 105) 24; (106) 27; (107) 28; (108, 109) 22; (110, 111) 23; (112) 24.
- MONTANA.** — (9) 18; (10) 24; (11) 28; (12) 22.
- NEBRASKA.** — (22) 8; (23, 24) 8; (25) 13; (26) 18; (27) 20; (28, 29) 20; (30) 27; (31) 28; (32, 33) 29; (34) 22.
- NEVADA.** — (19) 8; (20) 19.
- NEW HAMPSHIRE.** — (64) 10; (62) 13; (65) 22.
- NEW JERSEY.** — (43 N. J. Eq.) 3; (44 N. J. Eq.) 6; (50 N. J. L.) 7; (51 N. J. L.; 45 N. J. Eq.) 14; (46 N. J. Eq.; 52 N. J. L.) 19; (47 N. J. Eq.) 24; (53 N. J. L.) 26; (48 N. J. Eq.) 27; (49 N. J. Eq.) 21; (54 N. J. L.) 22.
- NEW YORK.** — (107) 1; (108) 2; (109) 4; (110) 6; (111) 7; (112) 8; (113) 10; (114) 11; (115) 12; (116, 117) 15; (118, 119) 16; (120) 17; (121) 18; (122) 19; (123) 20; (124, 125) 21; (126) 22; (127) 24; (128, 129) 26; (130, 131) 27; (132, 133) 28; (134) 20; (135) 21; (136) 22; (137) 23; (138) 24.
- NORTH CAROLINA.** — (97, 98) 2; (99, 100) 6; (101) 9; (102) 11; (103) 14; (104) 17; (105) 18; (106) 19; (107) 22; (108) 23; (109) 26; (110) 26; (111) 22; (112) 24.
- NORTH DAKOTA.** — (1) 26; (2) 22.
- OHIO.** — (45 Ohio St.) 4; (46 Ohio St.) 15; (47 Ohio St.) 21; (48 Ohio St.) 29; (49 Ohio St.) 24.
- OREGON.** — (15) 8; (16) 8; (17) 11; (18) 17; (19) 20; (20) 22; (21) 22; (22) 29.
- PENNSYLVANIA.** — (115, 116, 117 Pa. St.) 2; (118, 119 Pa. St.) 4; (120, 121 Pa. St.) 6; (122 Pa. St.) 9; (123, 124 Pa. St.) 10; (125 Pa. St.) 11; (126 Pa. St.) 12; (127 Pa. St.) 14; (128, 129 Pa. St.) 15; (130, 131 Pa. St.) 17; (132, 133, 134 Pa. St.) 19; (135, 136 Pa. St.) 20; (137, 138 Pa. St.) 21; (139, 140, 141 Pa. St.) 22; (142, 143 Pa. St.) 24; (144, 145 Pa. St.) 27; (146 Pa. St.) 28; (147, 150 Pa. St.) 20; (151 Pa. St.) 21; (148 Pa. St.) 22; (149, 152, 153 Pa. St.) 24.
- RHODE ISLAND.** — (15) 2; (16) 27; (17) 22.
- SOUTH CAROLINA.** — (26) 4; (27, 28, 29) 13; (30) 14; (31, 32) 17; (33) 26; (34) 27; (35) 28; (36) 21; (37) 24.
- TENNESSEE.** — (85) 4; (86) 6; (87) 10; (88) 17; (89) 24; (90) 25; (91) 20.
- TEXAS.** — (68) 2; (69; 24 Tex. App.) 5; (70; 25, 26 Tex. App.) 8; (71) 10; (27 Tex. App.) 11; (72) 13; (73, 74) 15; (75) 16; (76) 18; (77; 28 Tex. App.) 19; (78) 22; (79) 23; (29 Tex. App.) 25; (80, 81) 26; (82) 27; (30 Tex. App.) 28; (83) 29; (84) 21; (85) 24.
- VERMONT.** — (60) 6; (61) 15; (62) 22; (63) 25; (64) 22.
- VIRGINIA.** — (82) 2; (83) 5; (84) 10; (85) 17; (86) 19; (87) 24; (88) 29.
- WASHINGTON.** — (1) 22; (2) 26; (3) 28; (4) 21; (5) 24.
- WEST VIRGINIA.** — (29) 6; (30) 8; (31) 13; (32, 33) 25; (34) 26; (35) 29; (36) 22.
- WISCONSIN.** — (69) 2; (70, 71) 5; (72) 7; (73) 9; (74, 75) 17; (76, 77) 20; (78) 22; (79) 24; (80) 27; (81) 29; (82) 22.
- WYOMING.** — (3) 21.

AMERICAN STATE REPORTS.

VOL. XXXIV.

CASES REPORTED.

NAME.	SUBJECT.	REPORT.	PAGE.
Alton v. First Nat. Bank.....	<i>Mistake</i>	157 Mass. 341....	285
Anderson v. Land.....	<i>Attachment</i>	5 Wash. 493...	875
Argo v. Coffin.....	<i>Deeds</i>	142 Ill. 368.....	86
Armstrong v. Best.....	<i>Married women</i>	112 N. C. 59.....	473
Atlantic Works v. Tug Glide.....	<i>Admiralty</i>	157 Mass. 525....	305
Austrian v. Springer.....	<i>Agency</i>	94 Mich. 343....	350
Bacon v. Leslie.....	<i>Specific perform'nce</i> .	50 Kan. 494....	134
Bard v. Penn etc. Ins. Co.	<i>Insurance</i>	153 Pa. St. 257...	704
Barron v. Detroit.....	<i>Mun. corporations</i> ..	94 Mich. 601....	366
Benham v. Ham.....	<i>Assignment for benefit of creditors.</i>	5 Wash. 128...	851
Bingel v. Vols.....	<i>Wills</i>	142 Ill. 214.....	64
Bodine v. Arthur.....	<i>Deeds</i>	91 Ky. 53.....	162
Boehmer v. Detroit Free Press Co..	<i>Libel</i>	94 Mich. 7.....	318
Bonar v. Means.....	<i>Fraud. conveyances</i> .	37 S. C. 530....	772
Bourlier v. Macanley.....	<i>Master and servant</i> .	91 Ky. 135....	171
Boyd v. Thompson.....	<i>Partnership</i>	153 Pa. St. 78....	685
Boyle v. Boyle.....	<i>Wills</i>	152 Pa. St. 108...	629
Brundred v. Rice.....	<i>Carriers</i>	49 Ohio St. 640..	599
Burger v. Missouri Pac. R'y Co...	<i>Railroads</i>	112 Mo. 238.....	379
Burke v. Finley.....	<i>Exemptions</i>	50 Kan. 424....	132
Calvert v. Rice.....	<i>Waste</i>	91 Ky. 533.....	240
Cameron v. Gebhard.....	<i>Homestead</i>	85 Tex. 610.....	832
Chambers v. Baldwin.....	<i>Contracts</i>	91 Ky. 121.....	165
Chartiers etc. Coal Co. v. Mellon.	<i>Mines</i>	152 Pa. St. 286...	645
Cole v. Cole.....	<i>Mar'ge and divorce</i> .	142 Ill. 19.....	56
Coleman v. Insurance Co.....	<i>Insurance</i>	49 Ohio St. 310..	565
Collins v. Dispatch Pub. Co.....	<i>Libel</i>	152 Pa. St. 187...	636
Commonwealth v. Dalsell.....	<i>Corporations</i> ...	152 Pa. St. 217...	640
Commonwealth v. Graham.....	<i>Conflict of laws</i>	157 Mass. 73.....	255
Commonwealth v. Holmes.....	<i>Criminal law</i>	157 Mass. 233....	270
Commonwealth v. Woodward.....	<i>Grand jury</i>	157 Mass. 516....	302
Cooper v. Lansing Wheel Co.....	<i>Contracts</i>	94 Mich. 272....	341

NAME.	SUBJECT.	REPORT.	PAGE.
Copeland v. Draper.....	<i>Bailments</i>	157 Mass. 558....	314
Crocker v. Collins.....	<i>Mun. corporations</i> ..	37 S. C. 327	752
Curnow v. Phoenix Ins. Co.	<i>Insurance</i>	37 S. C. 406	766
Davis v. Laning.....	<i>Attainder</i>	85 Tex. 39.....	784
Demaree v. Scates.....	<i>Officers</i>	50 Kan. 275	113
Diem v. Koblitz.....	<i>Sales</i>	49 Ohio St. 41..	531
Doherty v. O'Callaghan.....	<i>Attorney and client</i> ..	157 Mass. 90.....	258
Dorsey v. Wolff.....	<i>Neg. instruments</i> ...	142 Ill. 589.....	99
Douglass v. Ferris.....	<i>Guardian and ward</i> ..	138 N. Y. 192....	435
Douglass v. Phenix Ins. Co.	<i>Abatement</i>	138 N. Y. 209....	443
Dukes v. Faulk.....	<i>Estates</i>	37 S. C. 255....	745
Dunstan v. Higgins.....	<i>Judgments</i>	138 N. Y. 70.....	431
Ellinger v. Philadelphia etc. R. R.	<i>Railroads</i>	153 Pa. St. 212..	697
Estate of Stebbins.....	<i>Wills</i>	94 Mich. 304....	345
Fahnestock v. Fahnestock.....	<i>Wills</i>	152 Pa. St. 56....	623
Florida etc. R. R. Co. v. State...	<i>Mandamus</i>	31 Fla. 482.....	30
Foley v. Mutual Life Ins. Co.....	<i>Guardian and ward</i> ..	138 N. Y. 333....	456
Franco-Texan L. Co. v. McCormick	<i>Corporations</i>	85 Tex. 416....	815
Freiberg v. Walsen.....	<i>Homestead</i>	85 Tex. 264....	808
Friend v. Lamb.....	<i>Specific perform'nce</i> ..	152 Pa. St. 529..	672
Garnett v. Farmers' Nat. Bank...	<i>Suretyship</i>	91 Ky. 614.	246
Gaw v. Bennett.....	<i>Wagers</i>	153 Pa. St. 247..	699
Gilmore v. Federal Street etc. R'y Co.	<i>Street railways</i>	153 Pa. St. 31....	682
Grace etc. Church v. Dobbins.....	<i>Easements</i>	153 Pa. St. 294..	706
Gulf etc. R'y Co. v. Looney.....	<i>Railroads</i>	85 Tex. 158.....	787
Gustin v. Union School Dist.....	<i>Vendor and purch'r.</i>	94 Mich. 502....	361
Harris v. Tenney.....	<i>Sales</i>	85 Tex. 254....	796
Harrison v. Harrison.....	<i>Mar'ge and divorce</i> ..	94 Mich. 559....	364
Harrison v. Lebanon Waterworks	<i>Appealable orders</i> ..	91 Ky. 255.....	180
Hartranft's Estate.....	<i>Collateral securities</i> ..	153 Pa. St. 530..	717
Hasse v. American Express Co....	<i>Express companies</i> ..	94 Mich. 133....	323
Hasty v. Sears.....	<i>Master and servant</i> ..	157 Mass. 123....	267
Hauck v. Tidewater Pipe Line Co.	<i>Nuisance</i>	153 Pa. St. 366..	710
Herr v. Lebanon.....	<i>Negligence</i>	149 Pa. St. 222..	603
Hicks v. Beam.....	<i>Infancy</i>	112 N. C. 642....	521
Hogue v. Williamson.....	<i>Neg. instruments</i> ...	85 Tex. 553....	823
Holmes v. Gilman.....	<i>Insurance</i>	138 N. Y. 369....	463
Hope v. Barker.....	<i>Neg. instruments</i> ...	112 Mo. 338....	387
Huston v. Reutlinger.....	<i>Associations</i>	91 Ky. 333.	225
Jackson v. Pittsburgh Times.....	<i>Libel</i>	152 Pa. St. 406... 659	
Joseph Schlitz Brewing Co. v. Compton.....	<i>Nuisance</i>	142 Ill. 511.....	92
Kimball v. St. Louis etc. R'y Co.	<i>Conflict of laws</i>	157 Mass. 7.....	250
King County v. Ferry.....	<i>Officers</i>	5 Wash. 536....	880
Kline v. Bank.....	<i>Neg. instruments</i> ...	50 Kan. 91.	107
Koelsch v. Philadelphia Co.....	<i>Negligence</i>	152 Pa. St. 355 ..	653

CASES REPORTED.

13

NAME.	SUBJECT.	REPORT.	PAGE.
Kahn v. Richmond etc. R. R. Co.	Carriers	37 S. C. 1.....	726
Krug v. St. Mary's Borough.....	Mun. corporations..	152 Pa. St. 30....	616
Lester v. Best.....	Contracts	49 Ohio St. 240..	556
Loker v. Gerald.....	Mar'ge and divorce.	157 Mass. 42.....	252
Larkin v. Zane.....	Nuisance.....	157 Mass. 117....	302
Manly v. Bitzer.....	Assignment.....	91 Ky. 596.....	242
McDonald v. Maltz.....	Brokers	94 Mich. 172....	381
McGarry v. Avenill.....	Mechanic's lien.....	50 Kan. 363	120
Meixell v. Morgan....	Waters.....	149 Pa. St. 415... 614	
Masterman v. Home Mut. Ins. Co.	Insurance.....	5 Wash. 524....	877
Miltonvale etc. Bank v. Kuhnle...	Mortgages	50 Kan. 420	129
Montague v. Stotts.....	Collateral securities.	37 S. C. 200	786
Montross v. Eddy.....	Brokers.....	94 Mich. 160....	323
Murdock v. Walker.....	Boycotting	152 Pa. St. 595... 678	
Murrell v. Mandelbaum.....	Partnership.....	85 Tex. 22.....	777
Nice v. Walker.....	Mechanics' liens....	152 Pa. St. 122... 688	
Nerocross v. Otis.....	Debtor and creditor.	152 Pa. St. 481... 689	
Nuhn v. Miller.....	Husband and wife..	5 Wash. 405.... 688	
Orlando v. Fragg.....	Mun. corporations..	31 Fla. 111.....	17
Parke v. Seattle.....	Mun. corporations..	5 Wash. 1.....	839
Parkinson Sugar Co. v. Riley.....	Master and servant.	50 Kan. 401	123
Patnode v. Warren Cotton Mills..	Master and servant.	157 Mass. 283....	275
People v. Hodgkin.....	Sedump.....	94 Mich. 27.....	321
Peters v. Grim.....	Wagers.....	149 Pa. St. 163... 509	
Pitkin v. Benfer.....	Partnership.....	50 Kan. 106	110
Railroad Co. v. O'Donnell.....	Carriers.....	49 Ohio St. 459.. 578	
Rash v. Farley.....	Interstate commerce.	91 Ky. 344.....	233
Reiser v. Pennsylvania Co.....	Master and servant.	152 Pa. St. 33.... 620	
Renz v. Stoll.....	Trusts.....	94 Mich. 377.... 353	
Royer v. Odd Fellows' etc. Ass'n.	Corporations.....	157 Mass. 367.... 283	
Ricketts v. Louisville etc. R'y Co.	Deeds.....	91 Ky. 221.....	176
Ree v. Dwelling House Ins. Co....	Insurance.....	149 Pa. St. 94.... 595	
Roseman v. Carolina etc. R. R. Co.	Railroads.....	112 N. C. 709.... 524	
Rothschild v. Daugher.....	Acknowledgment ...	85 Tex. 332.....	811
Rucker v. Smoke.....	Agency.....	37 S. C. 377.....	753
Rumbough v. Southern Imp. Co...	Corporations	112 N. C. 751.... 523	
Schnur v. Citizens' Traction Co...	Street railways	153 Pa. St. 29.... 680	
Scott v. McNeal.....	Ex'rs and adm'rs ..	5 Wash. 309.... 863	
Sims v. Miller.....	Factors.....	37 S. C. 402.....	762
Spalding v. Ewing.....	Contracts.....	149 Pa. St. 375... 603	
Sparks v. Ball.....	Remainders.....	91 Ky. 502.....	236
State v. Ball.....	Contempt.....	5 Wash. 387... 366	
State v. Calhoun.....	Error coram nobis..	50 Kan. 523	141
State v. Insurance Co.....	Foreign corporations.	49 Ohio St. 440.. 573	
State v. Mason.....	Fraud. conveyances.	112 Mo. 374.....	390
State v. Phipps.....	Insurance.....	50 Kan. 609.....	152

NAME.	SUBJECT.	REPORT.	PAGE.
State v. Standard Oil Co.....	Corporations	49 Ohio St. 137..	541
State v. Young.....	Mandamus.	31 Fla. 504.....	41
Stebbins, Estate of.....	Wills	94 Mich. 304....	345
Stewart v. Madden.....	Trusts.....	153 Pa. St. 445...	712
Thorndike v. Thorndike.....	Limitations of act no. 142 Ill. 450.....		90
Tools v. Tools.....	Mar'ge and divorces. 112 N. C. 152....		479
Ulrich v. St. Louis.....	Mun. corporations.. 112 Mo. 123.		372
Vail v. Winterstein.....	Married women.... 94 Mich. 230....		334
Vanstory v. Thornton.....	Homesteads. 112 N. C. 196....		483
Viles v. City of Waltham.....	Domicile..... 157 Mass. 542....		311
Wabash R. R. Co. v. Dougan....	Garnishment..... 142 Ill. 243.....		74
Wall v. Pittsburgh Harbor Co....	Riparian rights.... 153 Pa. St. 427...		607
Wells v. Batts.....	Husband and wife.. 112 N. C. 203....		506
Western U. Tel. Co. v. Carter....	Telegraphs..... 85 Tex. 230.....		506
Western U. Tel. Co. v. Wisdom..	Telegraphs..... 85 Tex. 231.....		506
Williams v. Chicago eta. R'y Co..	Construct'n contract. 112 Mo. 463.....		488
Williams v. Johnson.....	Judgments	112 N. C. 424....	512
Williamson v. Yager	Gifts..... 91 Ky. 232.....		184
Wilson v. Boyers.....	Mun. corporations.. 5 Wash. 303...		806
Wisconsin eta. R. R. Co. v. Ross..	Railroads..... 142 Ill. 9.....		40
Wood v. Williams.....	Limitations of act no. 142 Ill. 233.....		79
Worthington v. Waring.....	Injunction. 157 Mass. 421....		294
Yerkes v. Richards.....	Specific perform'nce. 153 Pa. St. 642...		722

AMERICAN STATE REPORTS.
VOL XXXIV.

CASES
IN THE
SUPREME COURT
OF
FLORIDA.

ORLANDO v. PRAGG.

[21 FLORIDA, 111.]

MUNICIPAL CORPORATION IS NOT LIABLE FOR TORTIOUS ACT DONE BY ITS OFFICERS OR AGENTS UNLESS it is within the scope of the corporate powers as prescribed by its charter or by some positive enactment. If the act is wholly outside of the general or special powers of the corporation, it can in no event be liable, whether it directly commanded the performance of the act or it was done by its officers without express command; but if the act is not in this sense *ultra vires*, it may be the foundation of an action of tort against the corporation, either when done by its officers under its previous direct authority, or ratified, expressly or impliedly, by it, or when done by the officers, agents, or servants of the corporation in the execution of the corporate powers or the performance of corporate duties of a municipal nature.

MUNICIPAL CORPORATIONS — PLEADING — LIABILITY FOR TORTIOUS ACTS.—A complaint averring that the defendant, a municipal corporation, by and through its mayor, city council, servants, agents, and employees, entered upon plaintiff's premises, and without just cause removed, destroyed, and deprived plaintiff of the ownership, sale, use, and benefit of certain property therein designated, states a cause of action against the municipality. It does not appear from the complaint that the acts complained of were wholly beyond the power of the municipality, so as to render them *ultra vires*, and exonerate it from liability therefor.

NUISANCE — LIABILITY FOR ABATING ALLEGED. — If a MUNICIPALITY, acting under a general power to abate and prevent nuisances, abates that as a nuisance which is not such in fact, it does so at its peril. If, on the other hand, a nuisance in fact exists, the municipality is liable only when it exercises its power of abatement in an unreasonable, careless, or negligent manner, so as to produce unnecessary damage to private rights.

NUISANCE — LIABILITY FOR ABATING. — If a person keeps various animals on his premises in a city in such a manner as to create a nuisance, and, after a demand, neglects to abate such nuisance or to keep his premises in such a condition that no nuisance will exist, the municipality and its

officers may take such animals from such premises, transport them beyond the city limits, and turn them loose, without incurring any liability to their owner, though from such acts such animals are wholly lost to him, he, on his part, exercising no care to prevent such loss.

William H. Jewell, for the appellant.

J. Hugh Murphy, for the appellee.

TAYLOR, J. John M. Pragg, the appellee, sued the city of Orlando, the appellant, in trespass, the following being the declaration filed in the case: "And now comes the plaintiff, John M. Pragg, by his attorneys, Mershon and Rogers and J. Hugh Murphy, and complains of the defendant, the city of Orlando, of a plea of trespass on the case, for that, whereas, on or about the sixth day of July, A. D. 1887, the plaintiff was engaged in the business of a dealer in natural curiosities, and had attached to his shop a museum for the exhibition of live and stuffed animals of various kinds for profit; and while so engaged in business, and on or about the day and date aforesaid, the said defendant, by and through its mayor, city council, servants, agents, and employees, entered in and upon the premises of the plaintiff where said business hereinbefore mentioned was, by the plaintiff, being carried on, and situated on the west side of Orange Avenue, between Pine and Church Streets, in the said city of Orlando, and without just cause did then and there remove, destroy, and deprive the plaintiff of the ownership, sale, use, and benefit of the following described property, to wit: Two water turkeys in coop, two coons in cage, one dozen snakes (mixed) and two cages, two snipes and cage, one owl and cage, three turtles and cage, one lot chickens and cage, five alligators, one lot chicken and animal houses, one lot of shells, one fox, one lot of peafowls; whereby the plaintiff sustained damages in the sum of six hundred and thirteen dollars, and whereby plaintiff was further injured in his business, to his damage in the sum of two hundred dollars; wherefore plaintiff demands judgment for sixteen hundred dollars and costs of this action.

To this declaration the defendant municipal corporation demurred upon the ground that a city is not liable for illegal acts of its agents, and for "other causes appearing upon the face of the papers." This demurrer being overruled, the case went to trial upon a plea of the general issue, and resulted in a verdict and judgment for the plaintiff in the sum of three hundred dollars, and from this judgment an appeal is taken here.

The first error assigned is the order overruling the defendant's demurrer to the plaintiff's declaration. The contention of the appellant here, upon this assignment, is, that the declaration does not exhibit a case of corporate liability, because it does not show that the defendant city was acting within the scope of its corporate powers as prescribed by law, or that it was performing any duty imposed upon it by law, when it committed the acts complained of.

The law is well settled that municipal corporations can be held liable for tortious acts only that are committed while in the exercise of some power conferred upon them by law, or in the performance of some duty imposed upon them by law. "Where the act which produces the injury is outside of the powers conferred on the corporation, it cannot be held in damages. A municipal corporation is liable in damages for a lawful and authorized act of its agents done in an unauthorized manner, but not for an unlawful or prohibited act": 7 Lawson's Rights, Remedies, and Practice, sec. 4010; Cooley on Torts, 2d ed., 141; Field on Damages, sec. 80; *City of Chicago v. Langlass*, 52 Ill. 256; 4 Am. Rep. 603; *Anthony v. Inhabitants of Adams*, 1 Met. 284; *Hunt v. City of Boonville*, 65 Mo. 620; 27 Am. Rep. 299; *Mayor etc. v. Cunliff*, 2 N. Y. 165; *Hanvey v. City of Rochester*, 35 Barb. 177; *Schumacher v. City of St. Louis*, 3 Mo. App. 297. In discussing this rule, however, Mr. Dillon, in his work on Municipal Corporations, 3d edition, section 968, says: "The rule of law is a general one that the superior or employer must answer civilly for the negligence or want of skill of his agent or servant in the course or line of his employment by which another is injured. Municipal corporations under the conditions therein stated fall within the operation of this rule of law, and are liable accordingly to civil actions for damages when the requisite elements of liability coexist. To create such a liability, it is fundamentally necessary that the act done which is injurious to others must be within the scope of the corporate powers as prescribed by charter or positive enactment (the extent of which powers all persons are bound, at their peril, to know); in other words, it must not be *ultra vires* in the sense that it is not within the power or authority of the corporation to act in reference to it under any circumstances. If the act complained of is wholly outside of the general or special powers of the corporation as conferred in its charter or by statute, the corporation can in no event be

liable, whether it directly commanded the performance of the act, or whether it be done by its officers without its express command; for a corporation cannot of course be impliedly liable to a greater extent than it could make itself by express corporate vote or action; but if the wrongful act be not in this sense *ultra vires*, it may be the foundation of an action of tort against the corporation, either when it was done by its officers under its previous direct authority, or has been ratified or adopted, expressly or impliedly, by it, or when it was done by the officers, agents, or servants of the corporation in the execution of corporate powers, or the performance of corporate duties of a ministerial nature, and was done so negligently or unskillfully as to injure others; in which case the corporation is liable for the carelessness or want of skill of its officers or immediate servants or agents in the course of their authorized employment without express adoption or ratifying act. Such are the general principles of law, concerning which there is no disagreement." And again, in section 969, the same high authority says: "The principle that a municipal corporation is bound by the acts of its officers only when within the charter or scope of their powers, and that acts wholly outside of the powers of the corporation, or of the officers appointed to act for it, are void as respects the corporation, is vital; and the opposite doctrine has no support in reason, and very little, if any, in the judgments of the courts." Does the declaration here questioned show affirmatively upon its face that the acts complained of were wholly outside of and beyond any and every corporate power that the municipality had legal authority to exercise, so as to render it amenable to demurrer under the rule thus clearly laid down by Mr. Dillon? We think not. Under the provisions of section 20, page 249, McClellan's Digest (Fla. Rev. Stats., sec. 677), cities and towns generally are clothed with authority and power to prevent and abate nuisances, and to prevent or remove any accumulation of filth or other matter on or within premises within their limits which may cause disease, or affect the health of the city or town. It was developed in the proofs at the trial below that the acts complained of were committed in the exercise of this power conferred by law to prevent and abate nuisances. Consequently they cannot be said to be acts that, within themselves, are of such nature as to be impossible of commission, under any circumstances, by the city in the exercise of any

corporate power conferred upon it by law. The contention of the appellant, that the acts complained of were *ultra vires*, is untenable, and the order overruling the demurrer was proper.

There are many errors assigned, but as the judgment appealed from must be reversed upon the sixteenth assignment of error, viz., the overruling of the appellant's motion for a new trial, the discussion of that one alone will fully dispose of all questions applicable to the case.

Two of the defendant's grounds of its motion for a new trial that was overruled were, that the verdict of the jury was contrary to the evidence, and contrary to the law of the case. The plaintiff, Pragg, alone testified in his own behalf, and in substance as follows: that he was the plaintiff; that at the time of the alleged injury he was engaged in business in the city of Orlando; that he kept a kind of curiosity store and museum; that in the front shop he kept various fancy wares, jewelry, shells, stuffed animals, etc., and in the yard in the rear he had animals of various kinds, among others water turkeys, coons, snakes, alligators, turtles, snipes, chickens, owls, lot of shells, etc.; that on the 6th of July, as alleged in the declaration, Mr. Hodges, the city marshal of Orlando, came to his place of business with other policemen and carts and took and carried away all the animals, shells, etc., which witness had in the yard, and took them out of the city limits, and turned them loose. He gave a list of the things taken, together with his valuation of each item, the whole aggregating thirteen hundred and ninety dollars; that all of said property was thus lost to him, except that he afterwards recovered some of the shells. He did not go with the property when taken, and made no effort to recover it. The loss to his business was two hundred dollars. He demanded payment for his said property from defendant, who offered him fifty dollars, which he refused. This was the only evidence put in for the plaintiff at the trial below.

On behalf of the defendant E. J. Reel testified that about the time alleged, and before, he was a member of the county board of health for Orange County; that the plaintiff's premises had been complained of in June and July to the board several times by neighbors as offensive to sight and smell; that plaintiff had been notified to clean up same, and keep same clean and inoffensive; this order was given to him by the board one or two weeks before the removal of the prop-

erty by the city marshal. Finally the premises were visited and inspected by the board, and found in such offensive condition as to the yard where the animals were kept that the board in regular session declared the premises a nuisance, and the city council of Orlando was directed to have said nuisance abated.

Dr. J. W. Hicks testified for the defendant, that in June and July, 1887, he was secretary of the county board of health of Orange County; was also city physician of Orlando, and city health officer; that he had several times prior to the removal of plaintiff's property, as alleged, inspected said premises and found them in bad sanitary condition. The animals created offensive smells, and water decaying in shells was very offensive. He had several times ordered said premises cleaned. As secretary of said board of health he had, by order of said board, sent official communication to the city council of Orlando, about June, 1887, notifying them that the premises of plaintiff where the animals were kept had been declared a nuisance by the board, and said board directed said council to have same abated at once.

J. K. Duke, city clerk of the defendant city, also for the defendant, identified the minutes of the city council of said city, wherein said minutes showed that the action of the board of health declaring plaintiff's premises a nuisance, and ordering same abated by the city had been duly communicated to said council.

P. C. Hodges, also for the defendant, testified that he was city marshal of Orlando in June and July, 1887, and on or about the time alleged, he was ordered by a member of the city council to notify the plaintiff to remove the animals and shells kept on his premises in the yard, and to abate the same, the same having been declared a nuisance, and to carry same out of the city limits. That he gave plaintiff such notice, and twenty-four hours in which to remove same. He was directed that on failure of plaintiff to remove and abate said nuisance on notice, to remove and abate same himself. Mr. Giles, chairman of the committee on street sanitation, gave him the order. After giving plaintiff the notice, and he failing to remove said animals, witness, after notifying plaintiff what he was about to do, took and carried away said animals and shells, and left same outside of city limits—doing no unnecessary injury or damage to anything. The animals were turned loose.

N. L. Mills, for defendant, testified that he was a member of the city council at the time of the removal of the plaintiff's property as alleged, and was one of the committee to inquire into damages. Reported in favor of an allowance to plaintiff of fifty dollars; not that he thought it due plaintiff, but to settle matters without litigation. That he was familiar with the value of property such as plaintiff had, and which was taken, or alleged to have been, and that he knew what animals and other property plaintiff had in said yard and that said marshal removed, and that the whole lot was not worth one hundred dollars.

The foregoing is the substance of the entire evidence in the cause. In the evidence adduced for the defendant there is very clear and direct proof that the property of the plaintiff that was taken and removed from the city limits was in fact a nuisance, creating filth and noxious smells deleterious to the public health. The proof shows further that he had been notified and warned, a week or two prior to its enforced removal, to clean up his premises and to keep the same clean. It was proved also that his neighbors complained of his premises. It was proved also that the officials of the county board of health visited and inspected his premises and found it to be a nuisance, and afterwards in an official meeting of the board formally declared the property to be a nuisance, and officially directed the city council of the defendant city to abate it as such. It was further proved that the city marshal then notified the plaintiff of this action of the county board of health, and that the city council required him to remove the offensive matter from his premises, and that he would be allowed twenty-four hours in which to do so; and if not done then, the marshal himself would remove same. That failing to remove them himself within the time given him, the marshal then removed the offensive property beyond the city limits after informing plaintiff what he was about to do. The marshal swears that in removing them he did no more damage to anything than was necessary in the removal thereof. The plaintiff himself swore that he did not go along with the property when removed to look after or take care of same. To all of this evidence for the defendant there is not a word of contradiction or denial, nor any attempt even at a denial thereof from the plaintiff himself or anyone else. By the provisions of chapter 3603, Laws of Florida, approved February 16, 1885, the governor of this state was required to

appoint in each county a board of health consisting of five members; which board by said act was made a corporation. By section eight of said act said boards of health in their respective counties were given full power to act in regard to all matters pertaining to quarantine, public health, vital statistics, and the abatement of nuisances, and to appoint such agents as they might find necessary.

The uncontradicted proof of the defendant shows that the plaintiff's property removed was in fact a nuisance; that he was given fair warning first to rectify it; then that the county board of health, having full power by law to abate nuisances and to appoint such agencies as it saw proper, had declared said property to be a nuisance and ordered the defendant to abate it. The plaintiff was again given fair notice of this action and reasonable time to remove the offending property himself. Failing to do so, the city, having full power also by law to abate nuisances through its marshal, without unnecessary damage, itself removes the cause of the nuisance; and the plaintiff sits listlessly by and makes no effort to look after or care for his property. Under these circumstances, if true, and they are undenied, the defendant city was not liable in law for any damages that necessarily resulted to the plaintiff in the removal or abatement of property that was in fact a nuisance. The verdict of the jury was therefore clearly contrary to the evidence and to the law of the case, and the defendant's motion for a new trial should have been granted.

The power conferred in general terms on municipal corporations to prevent and abate nuisances cannot be taken to authorize the condemnation and destruction of that as a nuisance which, in its nature, situation, or use, is not such in fact; and if the city, acting under the general power, abate that as a nuisance that is not such in fact, it does so at its peril, and is liable for the damage done, if it turns out in proof that it has made a mistake: 1 Dillon on Municipal Corporations, 4th ed., sec. 374; *Yates v. Milwaukee*, 10 Wall. 497; *Everett v. Council Bluffs*, 46 Iowa, 66; Wood's Law of Nuisances, sec. 744.

On the other hand if the city, under this general power, is proceeding against that as a nuisance which is in fact such because of its nature, situation, or use, it is then under the obligation to exercise the power of abatement in a reasonable manner so as to do the least injury to private rights; and if, where the fact of nuisance is clear, it exercises the power of

abatement in an unreasonable, careless, or negligent manner so as to produce unnecessary damage to private rights, it will be liable for the damage caused by such negligence: *State v. Newark*, 34 N. J. L. 264; 1 Dillon on Municipal Corporations, sec. 378; *Larson v. Furlong*, 50 Wis. 681; Wood's Law of Nuisances, sec. 741.

But if, as is shown by the uncontradicted proofs in this case, the fact of nuisance is clear, and the owner thereof is notified that he must remove same, and is given a reasonable time in which to do so, and he fails, and the city, acting under its general power, or as the agent of the county board of health, who have the same power, then remove or abate the same in such manner as not to bring about any unnecessary damage to the owner, then under the law the city is not liable.

The judgment appealed from is reversed and a new trial ordered.

MUNICIPAL CORPORATIONS — LIABILITY FOR NEGLIGENCE OR WRONGFUL ACTS OF OFFICERS, AGENTS, OR SERVANTS. — This subject is exhaustively treated in a note to *Goddard v. Harpswell*, 30 Am. St. Rep. 376-413. A city while acting, not in the management of its private affairs, but in the interest of the public, as the guardian of the health and welfare of the public, is not liable for the negligent acts of its officers or agents in the execution of its ordinances: *Whitfield v. Paris*, 84 Tex. 431; 31 Am. St. Rep. 69, and note. See also *Wilson v. Troy*, 135 N. Y. 96; 31 Am. St. Rep. 817.

MUNICIPAL CORPORATIONS — POWER TO ABATE NUISANCES. — Even without statutory authority, municipal corporations have ample power at the common law to abate a nuisance: *First Nat. Bank v. Sarlls*, 129 Ind. 201; 28 Am. St. Rep. 185, and note. Nuisances *per se* may be summarily removed by direction of the common council of a municipality: *Chase v. Oshkosh*, 81 Wis. 313; 29 Am. St. Rep. 898, and note; *Hart v. Mayor*, 9 Wend. 571; 24 Am. Dec. 165, and note. See extended note to *Milne v. Davidson*, 16 Am. Dec. 194-198.

MUNICIPAL CORPORATIONS — ABATEMENT OF NUISANCES — LIABILITY. — Where a railroad company has in good faith laid its tracks upon the streets of a city under authority, the city officers without legal proceedings, have no right to declare it a public nuisance because the kind of rail used was not to the best interests of the city and laid in violation of an ordinance, and then proceed to abate it by force. By so doing they become trespassers and rioters and liable civilly and criminally: *Easton etc. R'y Co. v. City of Easton*, 133 Pa. St. 505; 19 Am. St. Rep. 658, and note. A municipal corporation cannot declare that to be a nuisance which is not such in fact: *Ex parte O'Leary*, 65 Miss. 80; 7 Am. St. Rep. 640; *Des Plaines v. Poyer*, 123 Ill. 348; 5 Am. St. Rep. 524, and note.

LIABILITY OF MUNICIPAL CORPORATION FOR TORTS NOT SANCTIONED BY ITS CHARTER. — The principal case quoted with approval the statement of Judge Dillon that, "The principle that a municipal corporation is bound by the acts of its officers only when within the charter or scope of their powers, and that acts wholly outside of the powers of the corporation, or of the off-

cers appointed to act for it, are void as respects the corporation, is vital; and the opposite doctrine has no support in reason, and very little, if any, in the judgments of the courts"; and that to create a liability against a municipal corporation for the wrongful acts of its officers, "it is fundamentally necessary that the act done which is injurious to others must be within the scope of the corporate powers as prescribed by charter or positive enactment." If this general language were true without qualification, then no liability could exist against a municipality for the torts of its officers or agents; for such acts as are within the scope "of the corporate powers as prescribed by charter or positive enactment," surely cannot give rise to corporate or other liability, because they are sanctioned by law. In other words, if a charter gives the officers no power to do an act, the corporation cannot be liable because the officers act without authority, and if the charter gives such powers, the corporation is not answerable because what was done was authorized.

That Judge Dillon did not mean this is apparent from the language contained in the same quotation in which he says: "In other words, it must not be *ultra vires* in the sense that it is not within the power or authority of the corporation to act in reference to it under any circumstances. If the act is wholly outside of the general or special powers of the corporation as conferred in its charter or by statute, the corporation can in no event be liable, whether it directly commanded the performance of the act, or whether it be done by its officers without its express command; for a corporation cannot, of course, be impliedly liable to a greater extent than it could make itself by express corporate vote or action." We have heretofore examined this question and found that the authorities sustain the distinction made by Judge Dillon in holding, in effect, that where the defense of *ultra vires* exists, the corporation cannot be held answerable for a tort committed by its officers or agents: Note to *Goddard v. Harpswell*, 30 Am. St. Rep. 405-411. In order, however, to successfully invoke this defense, it is not sufficient that a particular act as done was not authorized by law. If the municipality had the right to do it under some circumstances or in some manner, then it may be liable for doing it in different circumstances or in a different manner. In other words, if the matter is one calling for municipal action so that its officers in what they do cannot be said to be acting without jurisdiction, then the municipality may be answerable for a tort committed by them either from being mistaken as to the propriety of the act in the given case, or in the mode in which they undertake to perform their supposed duty.

If a private corporation interposes the plea of *ultra vires*, it will generally not be allowed to prevail unless in furtherance of justice. This rule, if not applicable to municipal corporations under all circumstances, ought to apply at least so far as to prevent them from working iniquity by calling into action the police and governmental machinery within their control to despoil their citizens, and then escaping liability on the ground that they had no power to work such spoliation. Every municipality has a council to determine what it shall and shall not do, and police and other officers to do what the council resolves shall be done, and from the doing of which, if wrongful, injurious consequences must necessarily result to private citizens. That a municipality may be exempt from liability when exercising governmental functions is well settled upon authority, and perhaps beyond controversy, upon principle. When, however, the act done is not one for which municipal liability must be denied because it is governmental in character, and is one which the municipality did intentionally and in the assumed exercise of municipal functions, and from the doing of which injurious con-

sequences result to a private citizen, it is well-nigh iniquitous to deny him redress on the ground that the municipality was not given power to do what it did. There are doubtless authorities going to this extreme: *City of Chicago v. Turner*, 80 Ill. 420; *Mayor of Albany v. Oauliff*, 2 N. Y. 165; *Brown v. Cape Girardeau*, 90 Mo. 377; 59 Am. Rep. 28; *Lemon v. Newton*, 134 Mass. 476; *Trammell v. Russellville*, 34 Ark. 105; 36 Am. Rep. 1; *Cavanagh v. Boston*, 139 Mass. 426; 52 Am. Rep. 716; *Steele v. Deering*, 79 Mo. 343; 1 Am. St. Rep. 314; *Smith v. City of Rochester*, 76 N. Y. 506.

There are other cases which, without professing to overrule those just cited, it is not possible to harmonize with them. Thus where a city issued a permit to maintain a nuisance on its streets, and confessedly had no power to license such nuisance nor any nuisance whatever, it was held answerable to the party injured, the court rendering the opinion saying: "We simply say that when the city, without the pretense of authority, and in direct violation of a statute, assumes to grant to a private individual the right to obstruct the public highway while in the transaction of his private business, and for such privilege takes compensation, it must be regarded as itself maintaining a nuisance so long as the obstruction is continued by reason of and under such license, and it must be liable for all damages which may naturally result to a third party who is injured in his person or his property by reason or in consequence of the placing of such obstruction in the highway": *Cohen v. New York*, 113 N. Y. 532; 10 Am. St. Rep. 506.

This language is in accord with the rule stated in *Hawks v. Charlemon*, 107 Mass. 417, that, "When officers of a town acting as its agents do a tortious act with an honest view to obtain for the public some lawful benefit and advantage, reason and justice require that the town in its corporate capacity should be liable to make good the damage sustained by an individual in consequence of the acts thus done." Therefore, if the officers of a municipality, when engaged in its business, committed a trespass, acting on their part in good faith and believing their duty required them to do what they did, the city is answerable though it had no power to authorize them to commit such trespass. Thus municipalities usually are authorized to lay out and improve public streets, to abate nuisances, and to acquire property for the purpose of devoting it to certain public uses. The statutes do not and cannot authorize them to take or use such property otherwise than after just compensation has been made therefor, ascertained in the mode prescribed by law. Therefore it is impossible for the municipality, though all its officers should knowingly concur, to authorize the taking or using of private property without compensation. Nevertheless, it is clear that if its officers in good faith trespass upon and injure private property either in seizing, using, or improving as a public highway lands belonging to private proprietors against their consent, or in taking the property of private persons and using it in improving such highway, or in destroying or otherwise injuring private property under a mistaken belief that it constitutes a nuisance, the municipality is answerable: *Hawks v. Charlemon*, 107 Mass. 417; *Weed v. Greenwich*, 45 Conn. 170; *Woodcock v. City of Calais*, 66 Me. 234; *Lee v. Sandy Hill*, 40 N. Y. 442; *Sheldon v. Kalamazoo*, 24 Mich. 283; *Hildreth v. Lowell*, 11 Gray, 349; *Hickerson v. Mexico*, 58 Mo. 61; *Allen v. City of Decatur*, 23 Ill. 332; 76 Am. Dec. 692; *Sewall v. St. Paul*, 20 Minn. 511; *Walking v. Mayor etc.*, 5 La. Ann. 660; 52 Am. Dec. 608; *Crosett v. Janesville*, 28 Wis. 420; *Hunt v. Boonville*, 65 Mo. 620; 27 Am. Rep. 299; *Dooley v. City of Kansas*, 82 Mo. 444; 52 Am. Rep. 380; *McGary v. Lafayette*, 12 Rob. (La.) 668, 674; *Soulard v. St. Louis*, 36 Mo. 546.

In the principal case the declaration seems to have been construed in the light of the evidence offered at the trial and to have been sustained because that evidence disclosed that the officers of the defendant were acting in the execution of a power vested in the municipality to abate nuisances. There was nothing in the complaint showing the existence of any nuisance or even a claim upon the part of the municipality or of its officers that a nuisance existed. The court while professing to consider whether the complaint was subject to demurrer said: "It was developed at the trial that the acts complained of were committed in the exercise of this power conferred by law to prevent and abate nuisances. Consequently they cannot be said to be acts that within themselves are of such nature as to be impossible of commission under any circumstances by the city in the exercise of any corporate power conferred upon it by law. The contention of the appellant that the acts complained of were *ultra vires* is untenable and the order overruling the demurrer was proper." It is obvious that the complaint was either good or bad without any regard to the evidence, and therefore that the court did not fairly meet the question presented to it by the demurrer when it called to the aid of the complaint the evidence offered in its support after the demurrer had been overruled in the trial court. In our judgment, the complaint was good because it alleged that the acts described in it were done by the city, and such allegation was necessarily admitted for the purposes of the demurrer. This allegation was an allegation of an ultimate fact under which, if an issue thereon were formed by the answer, it was necessary for the plaintiff to prove the existence of the facts and circumstances from which the legal inference could be drawn that the acts as done were the acts of the municipality, as alleged in the complaint. If such proof were not made, then it would be the duty of the court to find that the allegation that the municipality had done the acts was untrue. This view it must be admitted does not meet with universal concurrence. Thus in *Caspary v. Portland*, 19 Or. 500, 20 Am. St. Rep. 842, a complaint containing an allegation that the plaintiffs were the owners of certain personal property, and that while they were such owners, the city of Portland unlawfully took and carried away such property and converted and disposed of the same for its own use, was adjudged insufficient for the reason that the pleader had not seen proper to develop his case far enough to enable the court to determine whether the maxim of *respondeat superior* applied to the acts or not. The theory of the court apparently was that it was the duty of the pleader to state the precise acts done and the persons by and the circumstances under which they were committed, and that from such statement it was the province of the court to determine whether the wrong complained of was one for which the municipality was answerable. Here, too, the question was not met fairly, for the entire attention of the court was given to considering the circumstances in which, under the maxim of *respondeat superior*, a city is liable for acts of its officers and agents, the court apparently being unconscious that the real question before it was one of pleading and not of proof.

The difference of opinion manifested by the two cases to which we have referred respecting the mode of pleading when it is sought to charge a municipality with the commission of a tort, is worthy of further judicial consideration. It is true that a municipal corporation can act only through its agents, and that persons who are its agents under certain circumstances or to do certain acts may not be authorized to represent it under other circumstances, or in the doing of other acts. But it is only when they are authorized to act for it that their acts are its acts, and therefore it seems to us that

when it is charged with doing an act, this is equivalent to charging it with doing such act by and through its authorized agents, and under circumstances in which they were authorized to represent it. If a private person, whether natural or artificial, does an act by an agent, it is proper, as a matter of pleading, to aver that such person did the act, without making any reference to the agency, and to support this allegation evidence is admissible to prove that the act was done by an assumed agent, and was within the scope of the powers delegated to him. There is no reason for the application of any different rule to pleadings charging a municipal corporation with the doing of acts, whether tortious or otherwise, unless perhaps when the acts are such as it could not do under any circumstances nor by any means. While we have not been able to discover any other authority bearing directly upon the question here considered, the precedents, so far as they appear in the reports, sustain the view to which we are inclined. Thus, in *Hanks v. Charlemont*, 107 Mass. 414, which was an action against the city by its corporate name of "Inhabitants of Charlemont," the allegation in the complaint was: "That the defendants, by their agents and servants, forcibly entered upon part of plaintiff's farm in Charlemont, and threw up the soil, and took and carried away a large quantity of stone, and converted it to their own use, and in consequence of the removal of the stone, the river washed away part of plaintiff's land, and the rest of it was exposed to similar injury from the river." *Lee v. Sandy Hill*, 40 N. Y. 442, was an action against the city for entering upon land, and the complaint, after averring the incorporation of the defendant, and the plaintiff's ownership of the land, stated: "That the defendant unlawfully, wrongfully, and forcibly entered upon the premises owned by the plaintiff, took forcible possession thereof, removed the fences, dug up the soil, and threatened to make a highway."

It is as true of private as of municipal corporations that they cannot act otherwise than by officers and agents, and that their powers are limited by their charters or articles of incorporation, and yet, so far as private corporations are concerned, it is well settled that a pleading which in effect alleges that a corporation did the wrong complained of, or made the contract which is sought to be enforced, is sufficient, and that neither the existence of agents nor their authority need be averred: *Sullivan v. Grass Valley etc. Co.*, 77 Cal. 418; *Malone v. Crescent City etc. Co.*, 77 Cal. 38. Thus in an action against a city for conspiracy it was said: "The plaintiff, in stating his cause of action against the corporation, may and should state the acts complained of as being the acts of the corporation itself, and it is not necessary or proper to aver in the complaint that they were done by or through the authorized agents of the corporation. It is a matter of proof upon the trial to establish that the person doing the act was the authorized agent of the corporation, for it can act only through its officers and agents. When a charge is made in a pleading against a corporation by its corporate name, the legal inference is that some person or persons in its employ did the act imputed": *Lubricating Oil Co. v. Standard Oil Co.*, 42 Hun, 158. This rule has also been held applicable to an action against a school town or district. Thus in an action in which the plaintiff relied upon a contract employing her to teach school, and her unlawful discharge before such contract was complied with, the court said: "The first objection to this complaint is that it does not show that the plaintiff was employed by the trustees of the school town. The complaint alleges that she was employed by the defendant, the school

town. As the corporation can only act by and through the trustees as its officers and agents, it is sufficient to charge the employment by the corporation, and prove it to have been made by and through its regularly constituted authorities": *School Town of Rochester v. Shaw*, 100 Ind. 263.

FLORIDA CENTRAL AND PENINSULAR RAILROAD CO. v. STATE.

[31 FLORIDA, 432.]

MANDAMUS—RELATORS. — If the object sought is the enforcement of a public right, the people are regarded as the real party and the relator need not show that he has any legal interest in the result. It is enough that he is interested as a citizen in having the laws executed and the duty in question enforced. Therefore, the citizens of a municipality may appear as relators in an application for a writ of mandate to compel a railway corporation to provide a depot in such municipality, and it is not necessary that the application be made by the attorney-general.

MANDAMUS—MISJOINDER OF PARTIES AS RELATORS. — That the mayor, inhabitants, and town of T. are joined as relators in an application for a writ of *mandamus* to compel the construction of a railway depot in such town, does not constitute a fatal misjoinder of relators. The words "mayor and inhabitants" may be treated as immaterial surplusage and the town as the only relator in the proceeding.

MANDAMUS DOES NOT LIE TO COMPEL THE PERFORMANCE OF PRIVATE CONTRACTS.

RAILWAYS. — CONTRACTS FOR THE ESTABLISHING OF A RAILWAY DEPOT exclusively in a particular place are void as against public policy.

MANDAMUS TO COMPEL A RAILWAY CORPORATION TO CONSTRUCT AND MAINTAIN A DEPOT at a designated place in a town will not be authorized though such railway has agreed to construct and maintain such depot at such place. The discretion of the railroad corporation as to the place where it will locate its depots will not be controlled by *mandamus*.

PRACTICE. — AN ALTERNATIVE WRIT OF MANDAMUS SHOULD BE QUASHED IF IT REQUIRES MORE TO BE DONE than is justified by the recitals of the writ, or if the respondent cannot, by looking at the writ alone, ascertain his duty, as where the writ commands an act to be done in conformity with the ordinances of a municipality, but does not disclose what such ordinances are.

Wall and Knight, and John A. Henderson, for the plaintiff in error.

Alex. St. Clair-Abrams, for the defendant in error.

TAYLOR, J. On the 11th of March, 1891, an alternative writ of *mandamus* was granted and issued by the judge of the circuit court in and for Lake County, in the seventh judicial circuit, upon the petition of the state on the relation of the mayor, inhabitants, and town of Tavares against the corporate plaintiff in error, the Florida Central and Peninsular

Railroad Company. Upon the denial of a motion to quash the alternative writ, and the sustaining of a demurrer to the respondent's answer, a peremptory writ was awarded, and from this judgment the respondent takes error.

The alternative writ, which contains all the recitals in the petition making application therefor, is as follows:—

“Whereas, the state of Florida, on the relation of the mayor, inhabitants, and town of Tavares, has filed its petition for *mandamus*, and it appearing from the allegations of the petition that the Florida Central and Peninsular Railway Company, successors to the Florida Railway and Navigation Company, is a corporation duly chartered under the laws of the state of Florida, and doing business in said state and within the limits of the town of Tavares, and that said town of Tavares has been a regularly established station of and for said railway for more than six years past, and that when the said railroad was first constructed, Alex. St. Clair-Abrams, in his own person, gave the said railway the right of way in the said town, and also a block of land known as Shore Park, the consideration of which was that said railway company should cause to be constructed on said block of land a passenger depot, and that all passenger trains of said railway company should stop at such passenger depot; and that the inhabitants and town of Tavares assented to the use and occupancy of the streets and avenues of said town by said railroad, upon the understanding and condition that the passenger depot would be constructed on the block known as Shore Park, said block being the best situated and most convenient to the people of Tavares, and that by reason of establishing a station in said town of Tavares, and by reason of its receipt of the land herein described, it became, and was, and still is, the duty of said railway company to construct a passenger depot on said block in said town of Tavares for the proper use and accommodation of the public; that the said Florida Central and Peninsular Railway Company has failed to construct any passenger depot whatever in said town, but stops its trains in the public streets in said town, exposing its passengers and the public to great inconvenience and hardship; that in winter while the public await the trains of said company, the only accommodations they have are bonfires lit in the public streets, around which the public have to cluster to obtain warmth; that no provision whatever being made for the public, passengers in said town are compelled to go to the water-

closets on the cars while they are standing in said streets, to answer the calls of nature, and human feces and urine are deposited on the public streets or public highway in said town, to the great scandal and injury of said town and the inhabitants thereof; that in rainy weather the public are compelled to remain uncovered in the rain, or to seek shelter in adjacent stores and buildings because of the failure of the said railway company to perform its duty of constructing suitable railroad accommodations; that the Florida Central and Peninsular Railway Company, the successor of the Florida Railway and Navigation Company, in the ownership, control, and operation of said railroad, still permits the scandalous and outrageous condition of affairs to exist in said town; that although repeatedly requested to construct suitable depot accommodations in said town, it has failed and refused to construct any whatever, and by reason of its failure so to do, great injury, damage, and inconvenience has resulted, to the injury of the inhabitants of said town, and to the town itself; that the Florida Central and Peninsular Railway Company has taken possession of and uses, controls, and claims the ownership of the lands deeded to the Florida Railway and Navigation Company, including the block of land known as Shore Park, deeded for a passenger depot, said block being bounded on the east by the St. Clair-Abrams Avenue, and on the north by Tavares Boulevard, but that the said railroad company utterly refuses to construct any depot on said block, or to construct any depot whatsoever in said town; that heretofore the said railroad company has stopped its passenger trains at the foot of Joanna Avenue in said town, where no depot accommodations whatsoever exist, and that the trains still stop at the foot of said avenue, but that on the 3d of January, 1891, the agents and employees of said railroad company were engaged in measuring the distance from defendant's railroad track near a large marsh to the post office, and that the petitioner is informed and believes that it is the purpose and intention of said railroad company to hereafter stop its trains near the edge of said marsh; that nearly the entire built-up portion of said town is east and north of said marsh; that the purpose of the defendant is to further annoy and injure the inhabitants of the town of Tavares; that if the passenger trains of defendant are stopped there it will not only inconvenience, but will inflict great injury upon said inhabitants and upon said town; that said marsh is unhealthy and

abounding in malaria; that it presents an unsightly appearance, is forbidding in aspect, and is calculated to impress a stranger most unfavorably of said town and said inhabitants; that it will force said inhabitants and the public to additional inconvenience and expense in going to and from the cars of defendant; that the locality is utterly unfitted for a passenger depot, of which fact the defendant is aware; that the block of land known as Shore Park is the best situated and most convenient for a passenger depot in said town, being only about two hundred and fifty feet from the post office and less than three hundred feet from the principal hotel, and from ten of the fourteen stores in said town, and the most accessible to nearly all of the residences in said town; that it is the duty of the defendant as a public carrier to construct all needed depot accommodations at every one of its stations; that the town of Tavares is an important station on defendant's road; that said town is the county seat of said Lake County; that it is the junction of five railroads; that the defendant has a large business in said town, both of freight and passengers, and that great wrong and injury has been done to the said town and inhabitants thereof by the failure and refusal of the defendant to construct the necessary depots; that by reason thereof the inhabitants of said town and the traveling public have been exposed to sickness and to suffering, and the public health has been endangered.

"It is therefore ordered that the respondents, the Florida Central and Peninsular Railway Company, proceed immediately to construct, or to have constructed, in the town of Tavares, on the block of land therein formerly known as Shore Park, and bounded on the east by St. Clair-Abrams Avenue, and on the north by Tavares Boulevard, a suitable depot for the accommodation of passengers, said depot to be constructed in conformity with the ordinances of said town, and to be completed by the first Monday in June, 1891, and to stop all their passenger trains at said passenger depot for the reception and delivery of passengers; or to show cause, if any they have, by the said first Monday in June, A. D. 1891, why they have not obeyed this writ. Done at chambers at DeLand, Volusia County, Florida, this eleventh day of March, A. D. 1891. JOHN D. BROOME, Judge."

The respondent's motion to quash this writ was upon the following grounds:—

1. There are no sufficient parties to said relation.

2. There is a misjoinder of parties to the relation.

3. The inhabitants of the town of Tavares have each their individual, full, and complete legal remedy for any and every grievance against the respondents.

4. No obligation of contract between Alex. St. Clair-Abrams and the Florida Railway and Navigation Company as charged, furnished a legal basis for redress for any breach thereof to the relators or either of them by *mandamus*.

5. There is no allegation in the relation of the existence of any ordinance of the town of Tavares in reference to the mode and manner of constructing a depot to support the requirement in the alternative writ that said depot be constructed in conformity with the ordinances of the said town.

6. There is no law of the state of Florida requiring the respondent to erect depots for the accommodation of passengers at the said station, nor for designating a place at said station where the same should be placed.

The refusal of the court to grant this motion is assigned as error. We shall confine our remarks to the points raised by this motion to quash, as a discussion of them will completely dispose of all questions involved in the case.

In support of the first ground of the motion to quash it is urged for the plaintiff in error that the proceeding having been instituted for the enforcement of a public right, no citizen, or number of citizens in their individual or collective capacity as such, would be entitled to the writ, but that the application for it should have been made by the attorney-general. While there are many cases in several of the states that sustain this contention, yet the decided weight and preponderance of the authorities establish the following to be the correct rule as to who are proper relators in *mandamus* proceedings: "When the remedy is resorted to for the purpose of enforcing a private right, the person interested in having the right enforced must be the relator. The relator (in such case) is considered the real party, and his right to the relief must clearly appear; but where the object is the enforcement of a public right, the people are regarded as the real party, and the relator need not show that he has any legal interest in the result. It is enough that he is interested as a citizen in having the laws executed and the duty in question enforced": 14 Am. & Eng. Ency. of Law, 218, and authorities there cited. The above has been adopted by this court as being the correct

rule, in *McConihe v. McMurray*, 17 Fla. 238, and in *State v. Crawford*, 28 Fla. 441.

The second ground on the motion to quash is, that there is a misjoinder of parties as relators. The writ was issued in the name of the state of Florida *ex relations*, "The mayor, inhabitants, and town of Tavares." The contention of the respondent is, that the mayor in his official character, and the inhabitants in their individual capacity, have no such similitude of duty or interests as makes it proper to have them joined as relators. Under our laws for the incorporation of cities and towns, such towns are required, as part of the process of incorporation, to adopt a corporate name, and by such corporate name they can sue and be sued: *McClellan's Digest*, 246, 247, secs. 4, 8; *Rev. Stats.*, 661, 665. There was no necessity to have used the words "mayor and inhabitants," in this proceeding. The accurate practice would have been simply to use the corporate name of the town as being the relator: 1 *Dillon's Municipal Corporations*, 3d ed., sec. 237, n. 1; as it was evidently the intention of the pleader to make the municipal corporation, "town of Tavares," the relator in the case. But, the object of the proceeding being to enforce the performance of a public duty, under the rule as above announced, the state is to be considered here as the real party; and as the town of Tavares by its corporate name is included as a relator, we can see no harm that could result from treating the words "mayor and inhabitants" as immaterial surplusage, particularly as the mayor is not individually named, and no individual inhabitant is named. The suit, according to the rule, could have been instituted on the relation of any citizen of the town of Tavares, or several of its citizens could have united as relators. The town of Tavares, being a corporation of the state, having the general power as such to sue and be sued, could also, in such a case, be the relator in its corporate capacity. The object of the proceeding being to enforce a public duty, so long as it is instituted and conducted in the name of the state, who, in such cases, is the real party, it is not a matter of much moment as to who is the relator, as that the proceedings will be quashed because of any mere technical misjoinder of parties as relators.

The third ground of the motion to quash contends that there is ample remedy at law for the relief sought here by *mandamus*. The sixth ground of the motion to quash is, that there is no law of the state of Florida requiring the respondent to

erect depots for the accommodation of passengers at the said station, nor for designating the place at such station where the same shall be located. These two grounds of the motion present the question as to whether the power exists in the courts, in the absence of legislation expressly and specifically prescribing it as a legal duty to be performed by such companies, to compel railroad companies by *mandamus* to establish stations along their lines and to erect and maintain thereat depot buildings for freight and passengers. From the specific relief sought by the writ in this case it becomes unnecessary for us to pass upon this question, since to pass upon it with the pleadings herein constructed as they are, would be adjudicating an abstract proposition not properly presented. Without, therefore, even intimating any conclusion of our own upon the question, we deem it proper to say that there is weighty and serious conflict in the authorities as to whether the courts can in any case compel a railroad company to establish a station, or to erect and maintain thereat depot buildings, unless there is legislation in express terms making it a legal duty that they must perform, in contradistinction to a discretionary power that they are authorized to carry out, or not as they see fit. Some of the authorities hold, that independently of any legislation, it is a common-law duty that such companies owe to the public, and that it will be enforced by *mandamus*: *Northern Pac. R. R. Co. v. Territory*, 3 Wash. (Ter.) 803; *State v. Republican Valley R. R. Co.*, 17 Neb. 647; 52 Am. Rep. 424; *McDonald v. Chicago etc. R. R. Co.*, 26 Iowa, 124; 96 Am. Dec. 114; *People v. Chicago etc. R. R. Co.*, 130 Ill. 175. Other authorities, upon the ground that the broad discretion vested in these companies in such matters by their charters is beyond the reach of judicial interference or control, hold that the courts cannot interfere unless the duty is made a clear one by express legislative enactment: *People v. New York etc. R. R. Co.*, 104 N. Y. 58; 58 Am. Rep. 484; *Northern Pac. R. R. Co. v. Territory*, 142 U. S. 492, overruling 3 Wash. (Ter.) 803. The case made, however, by the alternative writ before us does not seek merely to compel the erection of a depot building on the line of the respondent's road at some point at or near the town of Tavares, that will be reasonably subservient to the wants and convenience of the inhabitants and business of that community, leaving the exact spot of its location there to the discretion necessarily vested in the company in such matters; but the sole demand of the writ is,

that the respondent company shall be compelled to erect a depot building on the particular spot in said town known as "Shore Park."

There is no better settled elementary principle in the law of *mandamus* than that the writ will never lie to enforce the performance of private contracts: Merrill on *Mandamus*, sec. 16, and numerous authorities there cited; High on *Extraordinary Legal Remedies*, sec. 25, and authorities cited; *State v. Paterson etc. R. R. Co.*, 43 N. J. L. 505; *Parrott v. City of Bridgeport*, 44 Conn. 180; 26 Am. Rep. 439. Besides this principle, in so far as the alternative writ would seem to predicate its contention for the location of the depot upon the exact spot known as "Shore Park," upon the private contract between Alex. St. Clair-Abrams and the town of Tavares, on the one hand, and the railroad company on the other, it seems to be universally well settled that contracts undertaking to obligate a railroad company to establish its depot exclusively at a particular point, are void as against public policy. In *Marsh v. Fairbury etc. R. R. Co.*, 64 Ill. 414, 16 Am. Rep. 564, where the effort was made by bill in equity to enforce the specific performance of such a contract, the court says: "The location of railroad depots has much to do with the accommodation of the wants of the public. And when once established, a change of affairs may require a change of location, in order to suit public convenience. We cannot admit that an individual is entitled to call for the interference of a court of equity to compel a railroad company to locate unchangeably its depot at a particular spot to subserve the private advantages of such individual. Railroad companies, in order to fulfill one of the ends of their creation — the promotion of the public welfare — should be left free to establish and re-establish their depots wheresoever the accommodation of the wants of the public may require. To grant the relief asked for by the complainant we would regard as against public policy."

In *People v. Chicago etc. R. R. Co.*, 130 Ill. 175, the court says: "It is in recognition of the paramount duty of railway companies to establish and maintain their depots at such points, and in such manner as to subserve the public necessities and convenience, that it has been held by all the courts, with very few exceptions, that contracts materially limiting their power to locate and relocate their depots, are against public policy, and therefore void." The same doctrine was

announced by Chief Justice Shaw in *Fuller v. Dame*, 18 Pick. 472; and also in *St. Joseph etc. R. R. Co. v. Ryan*, 11 Kan. 602; 15 Am. Rep. 357; *Pacific R. R. Co. v. Seely*, 45 Mo. 212; 100 Am. Dec. 369; *Currie v. Natches etc. R. R. Co.*, 61 Miss. 725. In *Mobile etc. R. R. Co. v. People*, 132 Ill. 559, 22 Am. St. Rep. 556, the court says: "The location of stations for the receipt and discharge of passengers and freight at points most desirable for the convenience of travel and business being indispensable to the efficient operation of a railroad and the enjoyment of it by the public, the railway company cannot be compelled on the one hand, to locate stations at points where the cost of maintaining them will exceed the profits resulting therefrom to the company, nor allowed, on the other hand, to locate them so far apart as to practically deny to the communities on the line of the road reasonable access to its use. A railway company cannot be compelled to maintain or continue a station at a point when the welfare of the company and the community in general requires that it should be changed to some other point. A railway company cannot bind itself, by contract with individuals, to locate and maintain stations at particular points, or to not locate and maintain them at other points. The company must be left free to establish and re-establish its depots wherever the public welfare or wants of the public may require." The same doctrine is held in *Holladay v. Patterson*, 5 Or. 177, in which case the court says: "A railroad company is a quasi public corporation, and the public have an interest in the location of their lines of road and depots. An agreement which tends to lead persons, charged with the performance of trusts or duties for the benefit of others, to violate or betray them, will not be enforced": *Texas & Pac. R'y Co. v. Marshall*, 136 U. S. 393.

Counsel for the relator contends, however, in his briefs filed here, that the right to compel the location of the depot on Shore Park is not predicated upon the contract between Mr. St. Clair-Abrams and the town of Tavares, on the one hand, and the railroad company on the other, but that the allegations as to this contract contained in the writ are merely by way of recital to show that the company owned sufficient and suitable land for depot purposes, donated for such purpose, and that such land is most convenient for public use, and to forestall any claim by the company that they were without land in a convenient part of the town for depot purposes. Conceding, for the purposes of this case, that the alternative

writ as framed will permit this contention, still the law will not, in our judgment, authorize the court to dictate the exact spot of the location of the depot building, or to confine its location to any particular lot or block of ground. All of the authorities *supra*, bearing upon this question, agree that a very broad discretion is vested in these companies by their charters in the matter of the location of their roads, stations, depots, etc.

We have been unable, after the most laborious search, to find a single case where any court has ever undertaken to so far encroach upon this discretion as to dictate the exact spot of the location of one of its depot buildings; and though the power may lay in the courts, upon a proper case made, and without legislation expressly enjoining it as a specific legal duty, to compel railroad companies to erect depot buildings at their stations so that the convenience of the public there will be reasonably and measurably subserved, still we are perfectly satisfied from the authorities cited that the courts are not authorized to so far control the company's discretion in the matter as to dictate, in any case, the exact spot of the location of one of its depot buildings; but such exact location must, of necessity, in every case, be left to the company's discretion to determine, limited only by the condition that it must be so located as to be reasonably subservient to the convenience of the community to be accommodated thereby. In reaching this conclusion, we have not failed to consider that the language of our statute empowering railroads to build and maintain depots, is permissive only, and not mandatory, but even if it were mandatory as to the duty to erect depots, our conclusion would remain the same, — that the effort of this writ to dictate its exact location could not be sustained.

In the mandatory part of the alternative writ, to which the peremptory writ also conforms, the respondent is required, not only to construct a depot upon the particular lot known as "Shore Park," but to construct it "in conformity with the ordinances of said town." Neither in the relator's petition for the writ, nor in the recitals of the alternative writ, is there any mention whatever of the existence of any ordinance of said town prescribing any regulations as to buildings of any kind in said town. This defect in the alternative writ constituted the fifth ground of the respondent's motion to quash. It is well settled that great care, particularity, and certainty is required in the preparation of the mandatory part of the

alternative writ, and that it must conform to the case made by the recitals in the writ; and must not require more to be done than is justified by the recitals: *Merrill on Mandamus*, sec. 260; *Hartshorn v. Assessors of Ellsworth*, 60 Me. 276; *King v. Church Trustees of St. Pancras*, 1 Nev. & P. 507; 6 Ad. & E. 814; *Fisher v. Mayor etc.*, 17 W. Va. 628; *State v. State Board of Health*, 103 Mo. 22; *People v. Brooks*, 57 Ill. 142; *Tapping on Mandamus*, 871. Another rule applicable to *mandamus* that seems to be equally well settled, is, "that the range of action required of the respondent cannot be left to indiscriminate outside ascertainment, nor can he be required to look *dehors* the writ to ascertain his duty": *Merrill on Mandamus*, sec. 260; *Cross v. West Virginia etc. R'y Co.*, 84 W. Va. 742; *Hartshorn v. Assessors of Ellsworth*, 60 Me. 276; *State v. Mobile etc. R'y Co.*, 59 Ala. 321. The requirement of the respondent to construct its depots in conformity with the ordinances of the town of Tavares, not only overstepped the case as made by the recitals in the petition and writ, but left the respondent's duty thereunder in a state of uncertainty, to be ascertained from the town ordinance, if there was any, entirely *dehors* the writ.

The motion of the respondent to quash the alternative writ should have been granted.

The judgment of the court below is reversed, and the cause remanded for such further proceedings as shall not be inconsistent herewith.

MANDAMUS — RELATORS. — In case of an application for *mandamus* where private or corporate rights are affected, the relator must show an interest; but if the state is the real party and the relator a mere informer to secure the enforcement of a mere public duty, then a private individual may become the relator: *State v. City of Kearney*, 25 Neb. 262; 13 Am. St. Rep. 493; *State v. Grace*, 20 Or. 154. This question is discussed in the note to *Crane v. Chicago etc. R'y Co.*, 7 Am. St. Rep. 484.

MANDAMUS TO COMPEL PERFORMANCE OF PRIVATE CONTRACT will not be granted: *Tobey v. Hakes*, 54 Conn. 274; 1 Am. St. Rep. 114, and note. The granting of a writ of *mandamus* to enforce private rights is in the discretion of the court, and may be refused if the circumstances make it unwise or inexpedient to grant it: *Effingham v. Hamilton*, 68 Miss. 523.

RAILROADS CANNOT BIND THEMSELVES BY CONTRACT to maintain and continue stations at particular points upon their lines of road: *Mobile etc. R. R. Co. v. People*, 132 Ill. 559; 22 Am. St. Rep. 556. See extended note to *Williamson v. Chicago etc. R'y Co.*, 36 Am. Rep. 214.

STATE v. YOUNG.

[§1 FLORIDA, 894.]

MANDAMUS WILL ISSUE TO COMPEL A JUDGE TO HEAR A CAUSE if he has erroneously refused to hear it on the ground that he is disqualified or has not jurisdiction.

A JUDGE IS DISQUALIFIED to try or determine an application for the probate of a will made by the rector, wardens, and vestry of a particular Episcopalian church if he is a member of such vestry.

Fletcher and Wurts, for the relator.

RANEY, C. J. The petition, which by consent stands as the alternative writ of *mandamus* in this proceeding, shows that on the twenty-third day of June last, Russell E. Colcord, by his next friend, John L. Colcord, and the rector, wardens, and vestry of St. John's Episcopal Church, of Jacksonville, propounded for probate before the county judge of Duval County, sitting in the exercise of his probate jurisdiction, a written instrument purporting to be the last will and testament of one Amanda L. Colcord, in which alleged last will and testament the rector, wardens, and vestry of St. John's Church, Jacksonville, a religious corporation, is named as beneficiary. The county judge refused to admit the instrument to probate, and entered an order to that effect. From this order the relators appealed to the circuit court of the fourth circuit sitting in and for Duval County; and afterwards, upon the cause coming on to be heard, the defendant herein, the judge of that circuit, refused to hear the same, on the ground indicated by the following order, which he then and there made: "This cause coming on to be heard this tenth day of January, 1893, and it appearing that the rector and vestry of St. John's Church, a corporation, is a party interested, and the presiding judge of this court being a member of the said vestry, the said judge declines to proceed with the hearing on the ground that he is disqualified." It is also alleged in the petition that the said rector, wardens, and vestry of St. John's Church, Jacksonville, is a religious corporation, and that Judge Young has no beneficial interest under said alleged will and testament. The prayer is for a *mandamus* requiring the judge to take jurisdiction and determine the matter involved in said appeal. Judge Young has appeared, admitted the truth of the allegations of the petition, and submitted the question of his disqualification to us for its decision.

The first point suggested by the relator's brief is as to the

remedy, and in this connection the decision of this court in *State v. Van Ness*, 15 Fla. 317, is called to our attention and questioned. In it Judge Van Ness set up in his return to the writ of *mandamus* that he had held himself incompetent to sit in the cause in which it was sought to compel him to act, because the Pensacola and Louisville Railroad Company was a party, and that stock in the company was owned by W. A. Richardson and W. B. Belknap, the former of whom and the wife of the latter were cousins of the judge's wife. It was admitted by the relator in its application for the writ that Richardson was a stockholder, but denied that Belknap was. Neither Richardson nor Belknap were parties to the cause in the circuit court. These facts are shown by the original files in the case, which we have examined. The conclusion reached by this court was that *mandamus* did not lie; the reasoning of the opinion being that the only duty the judge had to perform was the exercise of his judicial discretion and judgment in the matter of determining his qualification, and that the writ did not lie to make him reverse that decision, even though it was wrong.

The judgment we have formed is that the conclusion reached in the above case as to the remedy is erroneous. No authorities are cited in it. The opposite conclusion had been adjudged in *Ex parte Henderson*, 6 Fla. 279, and *Anderson v. Brown*, 6 Fla. 299, where it was held that *mandamus* would lie from this court to the circuit court in case of its refusal to entertain jurisdiction when directed by law. The circuit court had refused to in the former case entertain an appeal taken from a judgment of a justice of the peace, the circuit court holding that it did not have the appellate jurisdiction, yet *mandamus* was awarded to require it to hear the appeal; while in the latter case an appeal was taken to this court from the order of the circuit court dismissing the appeal from the justice's judgment.

Whenever a circuit judge refuses to exercise jurisdiction in a cause of which he has jurisdiction, and should exercise it, *mandamus* is a proper remedy, at least in the absence of a remedy by appeal or writ of error, to require the exercise of jurisdiction: 1 Chitty on General Practice, 796, 797; *King v. Justices*, 1 Barn. & Adol. 1; *Rex v. Inhabitants of Glamorganshire*, 12 Mod. 403. A decision by a court or judge, that it or he has not jurisdiction of a cause, is not the exercise of his judicial judgment as to anything involved in the cause,

and hence it does not fall within that class of cases to which the rule that *mandamus* does not obtain to control judicial discretion applies: *Cowan v. Fulton*, 23 Gratt. 579.

In *Ex parte Bradstreet*, 7 Pet. 634, where a United States district court dismissed certain writs of right because the declarations did not show that the value of the land involved exceeded two thousand dollars, the supreme court of the United States awarded a writ of *mandamus* to require the former court to reinstate the causes, and proceed to try them, it being the practice to allow the jurisdictional value to be given in evidence, though not stated in the declaration. In *Railroad Co. v. Wiswall*, 23 Wall. 507, it was decided that an order of a circuit court of the United States remanding a cause to a state court for want of jurisdiction to decide it was not a final judgment, in the sense which authorizes a writ of error, and that the remedy of the party against whose will the action had been commenced was by *mandamus* to compel action, and not writ of error to reverse what had been done: See also *Insurance Co. v. Comstock*, 16 Wall. 258. The same court in *Ex parte Parker*, 120 U. S. 737, reaffirming the principle that *mandamus* properly lies in cases where the inferior court refuses to take jurisdiction where by law it ought to do so, or where having obtained jurisdiction in a cause, it refuses to proceed in the due exercise thereof, but that it will not lie to correct alleged errors occurring in the exercise of its judicial discretion while acting within its jurisdiction, awarded a writ of *mandamus* to the supreme court of Washington Territory to make it reinstate upon its docket an appeal which had been taken in compliance with law, and which that court had dismissed. The grounds of the motion to dismiss were that all the copartners had not joined in the appeal, or been served with notice of appeal, and because the evidence was not properly certified. The territorial court had held that the grounds were well taken, and thereupon, for want of jurisdiction to hear and determine the cause upon its merits, had dismissed the appeal. In the case of *Parker*, 131 U. S. 221, an appeal from an inferior court had been dismissed by the same territorial supreme court on the ground that no notice was given to parties of the application to the inferior judge for the appeal, and, further, that the judge could not entertain the application beyond the limits of his district. The supreme court of the United States held that no such notice was required by the law regulating the appeal, and that the judge

could act in the matter beyond his district; and the appeal having been taken in compliance with law, a *mandamus* was issued for the reinstatement and hearing of the appeal.

In *Cavanaugh v. Wright*, 2 Nev. 166, a *mandamus* issued to require a district court to try *de novo* an appeal which the district judge thought could only be tried as upon writ of error. In *Floral Springs Water Co. v. Rives*, 14 Nev. 431, there had been judgment before a justice of the peace in favor of the company against a county, and the county having appealed to the district court, the judge of the latter court refused to hear the appeal, on the ground that a justice of the peace had no jurisdiction of an action against a county; but the supreme court of that state held that justices had such jurisdiction, and awarded a *mandamus* requiring that the appeal be heard. In *Cowan v. Fulton*, 23 Gratt. 579, where a circuit judge refused to hear certain causes which had been transferred to his court, he holding that the statute directing the transfer was unconstitutional, a *mandamus* issued, directing him to reinstate and hear them; and in answer to the contention that orders striking the causes from the docket for want of jurisdiction could not be reversed by *mandamus*, it was decided such orders were not judgments in the causes, but simply refusals to hear and decide the cases. *Kent v. Dickinson*, 25 Gratt. 817, is to the same effect.

The following cases, like those above, also illustrate the appropriateness and efficacy of this writ where there is a refusal to exercise lawful jurisdiction: *Ex parte Dickson*, 64 Ala. 188; *Steele v. County Comm'rs*, 83 Ala. 304; *Beguhl v. Swan*, 39 Cal. 411; *Temple v. Superior Court*, 70 Cal. 211; *State v. Laughlin*, 75 Mo. 358; *Territory v. Judge of District Court*, 5 Dak. 275. And the line of distinction between the class to which they belong and the following, and others which might be cited, where it is sought to correct alleged errors in the decision of causes of which jurisdiction has been taken, becomes apparent on reasonably careful consideration: *Ex parte Newman*, 14 Wall. 162; *Ex parte Railway Co.*, 103 U. S. 794; *Ex parte Gordon*, 104 U. S. 515; *Ex parte Hoard*, 105 U. S. 578; *Ex parte Baltimore etc. R. R. Co.*, 108 U. S. 586; *Ex parte Morgan*, 114 U. S. 174; *Ex parte Brown*, 116 U. S. 401; *In re Sherman*, 124 U. S. 364. In so far as the case of *People v. Garnett*, 130 Ill. 340, conflicts with the authorities relied on by us in reaching our conclusion, we prefer the latter.

If the respondent, Judge Young, is disqualified by the facts

stated to hear the appeal, any decision he might make in the case would be of "no force or validity," but "null and void": Rev. Stats., sec. 970. If so disqualified, he has no power or jurisdiction to hear the case: Rev. Stats., secs. 967, 969, 970. On the contrary, if he is not disqualified by the circumstances alleged, it is his duty to hear the appeal and exercise his ordinary judicial functions in the cause, and it is the right of the relator to have him do so. In so far as the application or appropriateness of the remedy by *mandamus* is concerned, or the right of the parties to it, we can see no material distinction between this case and that of one where the question was as to the jurisdiction of the court on any of the grounds presented in the cases cited above. The exercise of judicial power is invoked here no less than in any of those cases, and we can and must decide here whether or not that power lawfully exists; and if it does not, we will deny the remedy asked, whereas we will grant the remedy if the power does exist. No decision has been made of any point involved in the pleadings, nor is any asked. The theory and purpose of the relator are to require the defendant to proceed in this matter as one properly cognizable by him, but as to which, from an alleged mistaken view of the law as to his power, he has refused to act. Should we grant the writ, we will say to him that he has authority to act upon the case as to which he has refused to act, and must do so; and in doing this, we of course would not review any decision of his in the case, and for two reasons, one of which is that he has never acted or made any decision in the case, and the other, that *mandamus* is not the remedy for reviewing judicial judgments in causes of which jurisdiction is taken: *King v. Justices of Kent*, 14 East, 895.

The fact that the question of jurisdiction may be raised on appeal from the judgment of the court on the merits does not preclude the remedy by *mandamus*: *Railroad Co. v. Koonts*, 104 U. S. 5, and authorities relied on *supra*. It is not a sufficient or adequate remedy: *Ray v. Wilson*, 29 Fla. 842.

In *State v. Walker*, 25 Fla. 561, there is an intimation of the correctness of the conclusions reached.

2. The incorporation of churches of the Protestant Episcopal faith, as well as those of other denominations, was begun early in the history of the territory, after its acquisition by the United States; the first instance here of an incorporating statute relating to the Episcopal Church being one approved July 2, 1823, and entitled "An act to incorporate the Protest-

ant Episcopal Congregation of the city of St. Augustine." By it the then incumbent wardens, two in number, and five vestrymen, whose several names are given, and their successors in office, were made a body corporate, of the name and style of "The Churchwardens and Vestrymen of the Episcopal Church in St. Augustine, called 'Trinity Church.'"

On the twenty-third day of February, 1839, "An act to incorporate the Protestant Episcopal Church at Jacksonville" was approved, and by it William J. Mills, Samuel L. Burritt, and Robert L. Bigelow, wardens, and Harrison R. Blanchard, and such others as were elected vestrymen of the Episcopal Congregation at Jacksonville, and their successors in office, were declared to be a body corporate by the name and style of "The Churchwardens and Vestrymen of St. John's Church at Jacksonville"; and it provided that "the said churchwardens and vestrymen, and their successors in office, shall be invested with all manner of property, real, personal, and mixed, including all moneys due or to become due, donations, gifts, grants, hereditaments, privileges, and immunities which may now or at any time hereafter belong to said church, and also all moneys that have been, or that may hereafter be, subscribed, given, granted, or conveyed for building a church for said congregation at Jacksonville, to hold the same for the proper use, benefit, and behoof of said church; and the said churchwardens and vestrymen, and their successors in office, shall be, and they are hereby declared to be, capable of suing and being sued, and of using all necessary measures for recovering or defending any and all property whatsoever which the said church may at any time hold, claim, or demand, and is herein secured, or otherwise; and also with powers to make all necessary rules and regulations for the temporal government of said church, and to recover in the name of the said church, or otherwise, as well the said moneys as other property, with all rents, issues, and profits of the same, or any lands, moneys, or other estate belonging thereto, or any part or parcel thereof." The act also provides for the annual election of wardens and vestrymen on the first Monday in Easter week, or as soon thereafter as may be, by the "wardens, vestrymen, and congregation," and that the wardens and vestrymen, or a majority of them, shall have power to fill vacancies. It also limits the value of the holdings of the corporation to fifty thousand dollars.

It is upon this act we understand that the St. John's Epis-

epopal Church at Jacksonville, of which Judge Young is a vestryman, rests its claim as a distinct body to corporate franchises. We find no other statute under which on this record we can take judicial knowledge of its incorporation as a separate legal entity as distinct from its membership of "Protestant Episcopal Church in the Diocese of Florida," as incorporated by the act of February 1, 1881 (chapter 3352), amending that of February 10, 1838. Such being the case presented to us, we perceive no reasonable ground for questioning the action of the judge in holding himself to be disqualified under our statute, which provides that no judge of any court shall sit or preside in any cause to which he is a party, or in which he is interested, or in which he would be excluded from being a juror by reason of interest, consanguinity, or affinity to either of the parties: Rev. Stats., sec. 967. We are entirely satisfied that a stockholder in a private corporation is disqualified by interest to sit as a judge in a cause to which the company is a party, though he himself is not named on the record: *Washington Ins. Co. v. Price*, 1 Hopk. Ch. 1; *Gregory v. Cleveland etc. R. R. Co.*, 4 Ohio St. 675; *Dimes v. Grand Junction Canal*, 3 H. L. Cas., 759; 12 Am. & Eng. Ency. of Law, 46, 47; *Peninsular R'y Co. v. Howard*, 20 Mich. 18. The decision in *Trustees v. Bailey*, 10 Fla. 213, does not conflict with this general principle, and hence it is unnecessary for us to say more of that case here.

Through the force and effect of this act the corporate franchise granted by it attaches to the churchwardens and vestrymen. In fact there can be no corporate body, nor can it have any right or powers as such, without them. The purpose of the act is that the wardens and vestrymen in the corporate capacity which the statute attaches to them, shall, as they are chosen and installed, be invested with the property, and have, exercise, and perform the powers and functions indicated by the statute. The particular end in view was continued succession, and thereby an avoidance of the inconveniences incident to frequent changes in the personality of the wardens and vestrymen. That they exercised these functions and powers in a corporate capacity, which the law attaches to them, instead of as mere individuals, does not lessen their interest in the property which they may hold, nor in the property rights which they represent. These interests are certainly property interests, both as to the wardens and vestrymen in their corporate capacity, and as to the church

or congregation as the *cestui que trust*; and they are none the less so as to the former body because they hold them in trust for the congregation, or for the use, benefit, and behoof of the church. That the interest may not be beneficial pecuniarily to the individual wardens or vestrymen does not make it any the less a property interest. If the corporate power given by this act can be exercised in the name of "the Rector, Wardens, and Vestrymen of St. John's Church, Jacksonville," then Judge Young is disqualified to sit in a cause in which he and others claiming the right to exercise the franchise conferred by the statute in question, are seeking to have an instrument probated as a last will and testament that makes a donation to the body corporate created by that act, and for the purpose of securing the property donated.

Whether or not a vestryman can sit as judge or juror in a case in which the right of his church to property is involved, independent of any statute defining his powers and duties, we are not called upon to decide: *Cleage v. Hyden*, 6 Heisk. 73. Nor do we consider the effect of the variance between the corporate name presented by the pleadings, and that to be found in the act of 1839. We decide the questions presented, and nothing more.

Judgment will be entered in favor of the defendant.

MANDAMUS TO COMPEL JUDGE TO TRY CAUSE. — *Mandamus* is the proper remedy to compel a court to take jurisdiction of a cause it has wrongfully dismissed on the ground that it had no jurisdiction: *State v. Hunter*, 3 Wash. 92. *Mandamus* may issue to order the trial of a cause in which the judge has refused to go into its merits on an erroneous construction of some question of practice: *State v. Ellis*, 41 La. Ann. 41. *Mandamus* will lie to compel a justice to issue an order where it appears that such an order should legally be issued: *State v. Eddy*, 10 Mont. 312. *Mandamus* may issue to compel judicial action: *Wood v. Strather*, 76 Cal. 545; 9 Am. St. Rep. 249. *Mandamus* lies to compel subordinate courts to proceed and determine causes before them: *Weeden v. Town Council*, 9 R. L. 128; 98 Am. Dec. 373. *Mandamus* is the proper remedy to compel an original hearing in a chancery suit: *Brown v. Buck*, 75 Mich. 274; 13 Am. St. Rep. 433, and note. See particularly the monographic note to *Dane v. Derby*, 89 Am. Dec. 739.

JUDGES. — DISQUALIFICATION ON ACCOUNT OF INTEREST OR BIAS: See extended note to *Moses v. Julian*, 84 Am. Dec. 131. The interest which disqualifies a judge to sit in a case under the Florida statute is a property interest in contradistinction to an interest of feeling or sympathy or bias which would disqualify a juror: *Ex parte Harris*, 26 Fla. 77; 23 Am. St. Rep. 548, and note with cases collected. See also *Sauls v. Freeman*, 24 Fla. 209; 12 Am. St. Rep. 190, and note.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

WISCONSIN CENTRAL RAILROAD CO. v. ROSS.

[142 ILLINOIS, 2.]

RAILROADS — NEGLIGENCE OF IN USE OF ANOTHER COMPANY'S TRACK. — A railroad company is responsible for accidents caused by a defective track, and is bound to exercise due care to safely carry passengers and property intrusted to it; it is therefore its duty to see that the road which it uses for such transportation, is safe and in good repair, whether such road is owned by it or not. If it uses the track of another company for such purpose, it is liable for damages to passengers or freight by reason of defects in the road of such other company so used by it, and this rule applies as between the company and its employees.

RAILROADS — NEGLIGENCE — DUTY TO EMPLOYEE WHILE USING ROAD OF ANOTHER COMPANY. — When an employee of a railroad company is directed to use the road of another company in the business of his employer, he has the right to treat such road as the road of his employer; and every railroad company whose employees use the road of another company under its direction or for its benefit owes it as a duty to such employees to see that such road is not in a condition which will unnecessarily endanger their lives or limbs.

RAILROADS — ASSOCIATION OF RAILWAYS USING TRACK — JOINT AND SEVERAL LIABILITY FOR NEGLIGENCE. — An association of railways running trains over the track of another company is liable to its servants for defects therein when it would be liable if the injury resulted from defects on its own track. In such case, the liability of such railways is joint and several.

TORTS — JOINT AND SEVERAL LIABILITY. — When several persons are jointly bound to perform a duty, they are jointly and severally liable for omitting to perform it, or for performing it negligently.

TORTS — JOINT AND SEVERAL LIABILITY. — When one has received an actionable injury at the hands of two or more wrongdoers, all, however numerous, are jointly and severally liable to him for the full amount of damages occasioned by such injury, and the plaintiff has his election to sue all jointly, or he may bring his separate action against each or any of them.

RAILROADS — LIABILITY FOR TORT WHEN OPERATED BY TRUSTEES. — When a railroad is operated in the name of the company by trustees for the bondholders of the road, without notice to third persons or to employees of the company that such trustees are operating the road or that it is operated in their names as trustees, an action by an employee to recover for personal injury caused by the use of a defective track may be maintained against such trustees individually, or in the name they use in operating the road.

RAILROADS — LIABILITY FOR TORT WHEN OPERATED BY TRUSTEES. — A railroad company which has voluntarily placed itself and its property and franchises in the hands of trustees to secure its debt to bondholders, cannot lie by when sued for a tort which it claims to have been committed by such trustees, and shield both itself and the trustees from liability by concealing the fact that the trustees are operating the road, until the statute of limitations has barred the right of action.

RAILROADS — TRUSTEES OF REGARDED AS AGENTS. — Trustees who are selected by a railroad company and who control the road and operate it to earn money to be applied in payment of the debts of the company must be regarded as its agents so far as relates to the transaction of its business with third persons.

NEW TRIAL. — NEWLY DISCOVERED EVIDENCE WHICH IS MERELY CUMULATIVE or tends to impeach a witness is not ground for a new trial.

James L. High and H. S. Boutell, for the appellant.

Brandt and Hoffmann, and J. S. Kennard, Jr., for the appellee.

MAGRUDER, C. J. This is an action, brought by appellee as administratrix of her deceased husband, David Ross, to recover damages for his death, alleged to have been caused by the wrongful act and neglect of the appellant company, and of the Pennsylvania Company. The two companies were originally made defendants, but the court instructed the jury to find the Pennsylvania Company not guilty. The only plea, filed by the appellant, was the general issue. The verdict and judgment in the trial court were in favor of the appellee and against the appellant. That judgment has been affirmed by the appellate court, and the case is brought here by appeal from the latter court.

The deceased was a brakeman or switchman, engaged in transferring a long train, consisting of some sixty-four or sixty-five freight cars, from the tracks and yard of the Wisconsin Central line across a portion of railroad track, known as the Panhandle "Y," to the tracks of the Stock Yard Company's railroad. The Panhandle "Y" tracks appear to have been owned on December 28, 1886, by the Chicago, St. Louis, and Pittsburgh Railroad Company. By some kind of arrangement with the latter company, the trains or cars of the Wis-

consin Central Line were entitled to pass from its tracks to the tracks of the Stock Yard Company's railroad over the Panhandle "Y." While the deceased was so engaged in transferring said train on the day last named, one of the cars of said train, on which he stood, leaped from the track and fell over, throwing the deceased to the ground. The cars following in the rear passed over his body, killing him instantly.

At the close of the testimony on both sides, the defendant, the Wisconsin Central Railroad Company, moved the court to instruct the jury to find for it, the said defendant. It also asked the court to give to the jury a written instruction to the same effect, which instruction was refused.

There was enough evidence to justify the submission of the question of defendant's liability to the jury. The evidence tended to show, that the deceased was employed by the defendant, or by the Wisconsin Central Line; that the Wisconsin Central Line was not a corporation, but was a name given to an association of five or six railroad corporations, having running and traffic arrangements with each other, and having some sort of an arrangement, under a lease, or contract, or otherwise, with the railroad company owning the tracks, called the Panhandle "Y," by which the trains and cars of the association were permitted to pass over said tracks; that this association of corporations advertised itself as the Wisconsin Central Line; that the appellant company was one of the corporations so associated under said name, as it is admitted to be by counsel for appellant in the following words used in their brief: "The evidence tended to show that the railroad of appellant formed part of the route so advertised;" that the deceased was killed, while engaged in transferring a train of cars, belonging to the Wisconsin Central Line, over the Panhandle "Y" as the servant and employee of the corporations forming that association; and that the cause of his death was the defective character of the rails and ties upon the track of the Panhandle "Y," over which the train in question was passing. Upon all these questions of fact the judgment of the appellate court, affirming that of the circuit court, is final and conclusive so far as we are concerned. Under the facts thus stated, was the appellant liable for the death of the appellee's intestate?

It is claimed, that the appellant is not liable because the defective tracks did not belong either to the appellant, or to the Wisconsin Central Line. But the following propositions

are well established both by reason and authority: A railroad company is responsible for accidents caused by defective tracks; it is bound to exercise due care to safely carry the passengers and property intrusted to it; it is, therefore, its duty to see to it, that the road, which it uses for such transportation, is safe and in good repair, whether such road is owned by it or not; if it uses the track of another company for such purpose, it is liable for damages to its passengers or freight by reason of defects in the road of such other company so used by it; this rule applies as between the railroad company and its employees. There is no evidence that the deceased had any knowledge of the defects in the track. Where the employee of a railroad company is directed to use the road of another company in the business of his employer, he has the right to treat such road as the road of the company employing him; and every railroad company, whose employees use the road of another company under its direction or for its benefit, owes it as a duty to such employees to see that such road is not in a condition which will unnecessarily endanger their lives or limbs. The rule is thus stated in Wood's Law of Master and Servant, 2d ed. sec. 357, p. 735: "A railway company running its trains over the track of another railway is liable to its servants for defects therein, when it would be liable if the injury resulted from defects on its own track." To the same effect are *Stetler v. Chicago etc. R'y Co.*, 46 Wis. 497, and cases there cited; *Illinois Cent. R. R. Co. v. Kanouse*, 39 Ill. 272; 89 Am. Dec. 307; *Elmer v. Locke*, 135 Mass. 575; *Snow v. Housatonic R. R. Co.*, 8 Allen, 441; 85 Am. Dec. 720. We are, therefore, of the opinion that the liability of the appellant cannot be defeated upon the ground, that the road in use at the time of the accident did not belong to appellant, or to the Wisconsin Central Line.

Equally untenable is the objection that the deceased was not in the particular service of the appellant alone. What was the precise nature of the association of the corporations operating under the name of the Wisconsin Central Line does not appear; but it appears that the deceased, and several of the witnesses who testified, were employed by that association. The corporations acting together paid the wages of the deceased. Such wages constituted a part of the expense of operating their roads. They were, therefore, sharing the expenses of such operation, whether they shared the profits or not. They owed to each of their employees the duty of see-

ing that the track, which they required him to use, was safe and in good repair. The track in question was used for their joint benefit and in their joint service. They were, therefore, jointly liable for any injury to their employees resulting from a defective track, for the use of which they were jointly responsible; and they were also severally liable. "If several persons are jointly bound to perform a duty, they are jointly and severally liable for omitting to perform or for performing negligently": *Consolidated Ice Co. v. Keifer*, 134 Ill. 481; 23 Am. St. Rep. 688.

Partners are jointly and severally liable for torts committed in the course of the partnership business: Story on Partnership, 7th ed., secs. 166, 167. It is true that, in this case, the suit is brought against one member only of the association, and not against all; but all the members need not be sued, though all may be jointly liable. The law treats all torts as several as well as joint. The injured party may, at his election, sue all the partners, or any one or more of them, for the tort: Story on Partnership, 7th ed., sec. 167. The rule is not confined to partnerships, but extends to all cases of joint torts at the common law, whether positive or constructive: Story on Partnership, 7th ed., sec. 167; *Connolly v. Davidson*, 15 Minn. 519; 2 Am. Rep. 154; *Champion v. Bostwick*, 18 Wend. 175; 31 Am. Dec. 376; *Wood v. Luscomb*, 23 Wis. 287. In *Wabash etc. R'y Co. v. Shacklet*, 105 Ill. 364, 44 Am. Rep. 791, we said: "Considering the question, then, in the light of public policy, we are of opinion the public interests will be best subserved by adhering strictly to the long and well-established principle that where one has received an actionable injury at the hands of two or more wrongdoers, all, however numerous, are severally liable to him for the full amount of damages occasioned by such injury, and the plaintiff in such case has his election to sue all jointly, or he may bring his separate action against each or any one of the wrongdoers."

It is also claimed that the road was operated by certain trustees for the first mortgage bondholders at the time the accident occurred, and that, therefore, the suit should not have been brought against the corporation itself, but against said trustees. It is not pretended that the road was in the hands of a receiver, or that the trustees in question were appointed by or acting under any order of court. The evidence upon this subject is meager. No trust deed executed by the cor-

poration to secure the bondholders was produced, and there is nothing to show what its terms and conditions were, if it existed. The only testimony that the trustees had possession of the road consists of oral statements to that effect by some of the witnesses.

There is no evidence that such trustees, if they were in possession, gave notice of any kind to third parties or to the employees of the company, that they were operating the road, or that they were operating it in their own names as trustees. The evidence tends to show that if they operated it at the time of the accident, they did so in the name of the corporation. If they were sued by the wrong name, they should have pleaded that fact. "Though a suit might be instituted against the trustees individually, by their own names, no objection is perceived why one cannot be maintained against them by the name they use": *Wilkinson v. Fleming*, 30 Ill. 353.

A railroad company which has voluntarily placed itself and its property and franchises in the hands of trustees to secure its debt to bondholders cannot lie by when sued for a tort which it claims to have been committed by such trustees, and shield both itself and the trustees from liability by concealing the fact that the trustees are operating the road, until the statute of limitations has barred the right of action. We do not wish to be understood as controverting the general doctrine that a railroad company is not liable at common law, or under statutes imposing liability for injuries resulting in death, for the negligence of mortgagees who are operating the road under a possession taken and held adversely: *Pierce on Railroads*, 285; *State v. European etc. R'y Co.*, 67 Me. 479. A mortgagor out of possession and control of property, real or personal, ought not to be liable for the acts of the mortgagee who is in possession of such property, and has an independent and adverse control of it; but we are not disposed to recede from the position taken in the case of *Grand Tower Mfg. etc. Co. v. Ullman*, 89 Ill. 244, where the suit was held to have been properly brought against the company, rather than against the trustees. Under the facts in the case at bar, so far as they are disclosed by the record, the following language used in the case of *Grand Tower Mfg. etc. Co. v. Ullman*, 89 Ill. 244, is precisely applicable: "It is also insisted no action can be maintained against the corporation because the road was in possession of trustees for the bondholders. These trustees seem to have been exercising the same functions the

corporation was formed to exercise. The character of the trust is not specifically shown by the proofs, but the fair inference would seem to be that the trustees were the trustees of the corporation, of its own selection, as well as of the bondholders, and were running the road to earn money to be applied in payment of the debts of the corporation. In such case, the trustees must be regarded as the agents of the corporation, in so far as relates to the transaction of business with third persons."

The letters "W. C. L." were upon the two engines which drew the train above referred to, and these letters are proven to have stood for the "Wisconsin Central Line." A number of the employees of that line have given their evidence in this case, and the tendency thereof, as well as of the rest of the evidence, is to the effect that the appellant company was a member of the association in question, and not that the trustees were members thereof.

Upon the motion for a new trial, the defendant filed an affidavit as to the discovery after the trial of a receipt, which, it was claimed, could not be found during the trial. A new trial was asked upon the ground that such receipt was newly discovered evidence. It was as follows: "Duplicate. Wisconsin Central Line. Wisconsin Central Railroad. Milwaukee and Lake Winnebago Railroad (I. H. Stewart and E. H. Abbott, trustees and lessees). Wisconsin and Minnesota Railroad Company. Minnesota, St. Croix, and Wisconsin Railroad Company. D. S. Wegg, Solicitor. \$70.00. Chicago, February 1, 1887. Received from Wisconsin Central Associated Lines the sum of seventy dollars in full of services of David Ross as foreman for December, 1887. Marcella H. Ross, Administratrix of Estate of David Ross, Decd." The fact that the receipt was given, the failure to find it, and its substance, were testified to on the trial.

The evidence furnished by the receipt was merely cumulative. It simply strengthened what the proof on the trial tended to show, that the deceased was employed and paid by the associated companies, and that the defendant was one of said companies. Mrs. Ross had sworn that her husband had been employed by the Wisconsin Central Railroad Company, and that his wages for December had been paid by that company. So far as the receipt was intended to impeach her, it furnished no ground for a new trial. It was natural enough that among the many names made use of, she should have failed to dis-

tinguish between the Wisconsin Central Line and the Wisconsin Central Railroad Company.

We do not think that there was any error in not granting a new trial for the reasons stated in the affidavit.

The judgment of the appellate court is affirmed.

RAILROADS — USE OF TRACK OF ANOTHER COMPANY. — LIABILITY TO EMPLOYEES INJURED THEREBY: See *Killian v. Augusta etc. R. R. Co.*, 79 Ga. 234; 11 Am. St. Rep. 410; *Georgia R. R. etc. Co. v. Friddell*, 79 Ga. 439; 11 Am. St. Rep. 444; *Sullivan v. Tioga etc. R'y Co.*, 112 N. Y. 643; 8 Am. St. Rep. 793; *Nugent v. Boston etc. R. R.*, 80 Me. 62; 6 Am. St. Rep. 151, and note; *Fletcher v. Boston etc. R. R.*, 1 Allen, 9; 79 Am. Dec. 695.

LIABILITY OF JOINT TORTFEASORS. — The liability of tortfeasors is joint and several. A remedy may be pursued against one, several, or all of the wrongdoers: *Belo v. Fuller*, 84 Tex. 450; 31 Am. St. Rep. 75; *Dyett v. Hyman*, 129 N. Y. 351; 26 Am. St. Rep. 533; *Consolidated etc. Machine Co. v. Keifer*, 134 Ill. 481; 23 Am. St. Rep. 688, and note; *Bunting v. Hogeatt*, 130 Pa. St. 363; 23 Am. St. Rep. 192, and note. See extended note to *Cartersville v. Cook*, 16 Am. St. Rep. 250. Where a person is injured through the joint negligence of two railroad companies, he may recover from both: *Chapman v. New Haven R. R. Co.*, 19 N. Y. 341; 75 Am. Dec. 344, and note; *Colegrove v. New York etc. R. R. Co.*, 20 N. Y. 492; 75 Am. Dec. 418, and note.

RAILROADS — NEGLIGENCE — LIABILITY WHEN OPERATED BY TRUSTEES. For an extended discussion of the liability of railroads when in the hands of trustees or receivers, see *Naglee v. Alexandria etc. R'y Co.*, 83 Va. 707; 5 Am. St. Rep. 308, and note. Trustees for the benefit of bondholders operating a railroad are personally liable to the same extent as the company would be for negligence: *Sprague v. Smith*, 29 Vt. 421; 70 Am. Dec. 424, and note; to the same effect see *Barter v. Wheeler*, 49 N. H. 9; 6 Am. Rep. 434.

NEW TRIAL — NEWLY DISCOVERED EVIDENCE: See notes to *Brown v. Mitchell*, 11 Am. St. Rep. 757; *Brown v. Grove*, 9 Am. St. Rep. 827, and *Fears v. Albee*, 5 Am. St. Rep. 85.

COLE v. COLE.

[142 ILLINOIS, 19.]

MARRIAGE AND DIVORCE — ALIMONY, ALTERATIONS OF. — Power over the subject-matter of alimony is not exhausted by the entry of the original order and decree of divorce, but is under the statute continuing for the purpose, at any time, of making such alterations thereof as may appear to the court, in the exercise of a judicial discretion, reasonable and proper.

MARRIAGE AND DIVORCE — ALTERATION OF ALIMONY — CONSIDERATIONS AFFECTING. — Application for an alteration or modification of a decree of divorce as regards alimony is always addressed to the judicial discretion of the court, and ordinarily, in the absence of fraud in procuring the

decree, the inquiry is, in all cases, whether or not sufficient cause has intervened, arising from the changed conditions of the parties since the decree, to authorize or require the court applying equitable rules and principles, to change the allowance.

MARRIAGE AND DIVORCE — ALIMONY, ALTERATION OF. — Application for a change in the amount of alimony after divorce must be founded upon new facts which have occurred since the decree was originally made, and in the absence of new facts, such decree is deemed to be *res adjudicata* between the parties.

MARRIAGE AND DIVORCE — ALIMONY, RULE FOR DETERMINING AMOUNT OF. A husband owes the wife, who by his fault has been driven to seek a permanent divorce, not only reasonable support and maintenance, but also that she shall be put in no worse condition by reason of the marriage, the dissolution of which has been caused by his willful misconduct. The husband must not profit by his own wrong, and restitution must be made to the wife of the property which she brought to the husband, or a suitable sum in lieu thereof be allowed out of his estate as alimony, so far as may be done consistently with the preservation of the rights of each, and also that a fair division shall be made, taking into consideration the relative wants, circumstances, and necessities of each, of the property accumulated by their joint efforts and savings. The policy of the law is to do justice, and to give to the injured wife, not merely what necessity, but what justice demands.

MARRIAGE AND DIVORCE — ALIMONY, CONSIDERATIONS INFLUENCING ALLOWANCE OF. — In many cases of divorce the allowance of alimony must be made upon the basis of support and sustenance of the wife only, growing out of the duty of the husband to suitably support and maintain her, as when she has brought nothing to the husband, and has contributed nothing to the accumulation of his estate, or when resort must be had to the future earnings of the husband, and like cases. In such cases, if the wife remarries and acquires other means of support, the alimony will be discontinued or reduced.

MARRIAGE AND DIVORCE — ALIMONY, CONSIDERATIONS AFFECTING THE ALLOWANCE OF. — When a divorced wife subsequently acquires property, so that her means increase, or the facilities of the husband to pay alimony diminish, the allowance thereof may be decreased, or if the wife's wants and necessities increase, or the ability of the husband to pay is increased, the allowance of alimony may also be augmented.

MARRIAGE AND DIVORCE — ALIMONY — REMARRIAGE — WHEN NOT GROUND FOR REDUCING. — When alimony, allowed the wife upon divorce, is a portion of the husband's estate allotted to the wife as a division of property, remarriage, or obtaining other means of support, will not afford grounds for a reduction of alimony.

MARRIAGE AND DIVORCE — ALIMONY, CONSIDERATIONS AFFECTING ALLOWANCE OF. — In decreeing divorce, the court may make such allowance to the wife in the nature of alimony, as, from the nature of the case, shall be fit, reasonable, and just, taking into consideration the circumstances of the parties. Such allowance may be made payable in installments, or in gross, within the discretion of the court.

MARRIAGE AND DIVORCE — ALIMONY — ADULTERY NOT GROUND FOR REDUCING. — After divorce has been granted and alimony allowed, the subsequent adultery or immoral conduct of either party is not ground for an increase or decrease in the amount of such allowance.

MARRIAGE AND DIVORCE — ALIMONY, POWER TO ALTER ALLOWANCE OF. —

Allowances of alimony, made in decrees for divorce, will not be altered or modified, except in cases where equity calls clearly for the interposition, but when it appears unconscionable to compel the husband, by his daily labor or otherwise, to support his divorced wife in idleness and prostitution, the court will modify or revoke its former order.

MARRIAGE AND DIVORCE — ALIMONY, ADULTERY AS GROUND FOR MODIFICATION OF. —

Adultery of the wife after divorce, and allowance of alimony payable in installments will not, of itself, constitute ground for a reduction of such alimony when the husband has failed to pay the installments, and in the absence of proof, that they are to be paid out of his earnings, or out of property which did not come to him from the wife originally or was not the result of their joint earnings or accumulations, or that her wrongdoing may not have been the result of lack of support arising from his failure to pay such installments of alimony.

D. T. Duncombe, for the appellant.

Henry M. Pierce, for the appellee.

SHOPE, J. It is contended that the decree for alimony is *res judicata*; that the court, after the term at which the decree was rendered, was without power to alter or change the allowance or vacate the decree. The statute provides that when a divorce shall be decreed the court shall make such order touching the alimony and maintenance of the wife and the care, custody, and support of the children as from the circumstances of the parties and the nature of the case "shall be fit, reasonable, and just." "And the court may, on application, from time to time make such alterations in the allowance of alimony and maintenance, and the care and custody of the children, as shall appear reasonable and proper": Rev. Stats., sec. 18, c. 40. The power over the subject-matter of alimony is not exhausted by the entry of the original order, but is, under the statute, continuing for the purpose at any time of making such alterations thereof as shall appear to the chancellor, in the exercise of a judicial discretion, reasonable and proper: *Foot v. Foot*, 22 Ill. 425; *Stillman v. Stillman*, 99 Ill. 196; 39 Am. Rep. 21; *Lennahan v. O'Keefe*, 107 Ill. 620.

The application for an alteration or modification of the decree is always addressed to the judicial discretion of the chancellor, and ordinarily, in the absence of fraud in procuring the decree, the inquiry is in all cases whether sufficient cause has intervened since the decree to authorize or require the court, applying equitable rules and principles, to change the allowance. The cases cited, and others in this court, construe the statute as authorizing the interposition of the court

where the circumstances of the parties have changed since the former order, and as giving the court power, for causes accruing subsequently, to alter and modify the allowance to meet the changed conditions of the party. It is not intended to continue the right to alter or modify the allowance upon the state of case existing when the decree was entered, or to review the action of the chancellor therein. The parties had their day in court, with the right of appeal if the decree was deemed erroneous, and it cannot be supposed that it was intended that the court should sit in review of its own decrees, or that the same or some succeeding chancellor presiding in the same court should, after the lapse of indefinite time, have power to reverse, alter, or modify a decree for alimony upon the facts existing at the time of its entry. This we understand to be the uniform holding in this state and elsewhere. Bishop's Marriage and Divorce, vol. 2, sec. 429, says: "The application for change is founded upon new facts which have occurred since the decree was originally made, and in the absence of new facts the original decree is deemed to be *res judicata* between the parties, which, like any other judgment, is not to be disturbed on a further hearing."

The question presented in this case therefore is, whether the adultery of the wife subsequently to divorce and allowance of alimony, as set forth in the petition, will authorize the interposition of the court to alter, modify, or set aside the decree for alimony. The allowance was to the wife alone. It appears by the original decree which is in the record that the divorce was granted at the suit of the wife for the willful misconduct of the husband. There is, however, nothing in the petition or record showing, or tending to show, the means or financial ability of the parties, or that any change therein has taken place. Whether the allowance was made to the wife for her reasonable support, which the husband was required by law to furnish her out of his estate, or, in whole or in part, by way of restitution of property brought by her to the husband, or as her reasonable and equitable share of an estate accumulated by their joint labor and economies, nowhere appears. At the common law the personal property and money of the wife became the property of the husband, absolutely, upon his reducing it to possession, and, independently of the conditions creating tenancy, by the curtesy initiate, he was upon the marriage entitled to the possession of her lands during coverture, *de jure uxoris*.

In England, prior to the passage of the divorce act (20 and 21 Victoria, 85) the courts were authorized to grant divorces *a mens et thoro*, only, except for causes rendering the marriage void *ab initio*. The universal practice, upon decreeing a divorce from bed and board, was to allow the wife, out of the income of the husband or his estate, a reasonable sum for her support, bearing usually a fixed relation to the amount of such income. There being no dissolution of the marriage relation, the property rights were unaffected by the decree, and the right of the wife to demand, and the duty of the husband to provide support for the wife suitable to their means and condition in life, continued as before the decree. The policy of the law, as administered in the ecclesiastical courts, looked to a reconciliation of the parties and preservation of the marriage relation, and hence the allowance was for the reasonable support of the wife only. The courts very frequently sought to do justice by increasing the allowance in cases where the property came from the wife, yet the alimony allowed was upon the basis of the wife's reasonable support during the separation.

From this practice of the ecclesiastical court is derived the technical definition that alimony is "that support which the husband, on separation, is bound to provide for the wife, and is measured by the wants of the wife and the circumstances or ability of the husband to pay." The duty of the husband to support and maintain the wife in a manner befitting his condition and circumstances in life still continues; but the foregoing definition may fall far short of what is termed alimony in our statute, and indeed in all those jurisdictions where divorces are granted *a vinculo matrimonii*. It will require no discussion or citation of authority to establish that the husband owes the wife, who by his fault has been driven to seek a permanent separation, not only reasonable support and maintenance, but also that she shall be put in no worse condition by reason of the marriage, the dissolution of which has been caused by his willful misconduct. Equity and good conscience require that the husband shall not profit by his own wrong, and that restitution shall be made to the wife of the property which she brought to the husband, or a suitable sum in lieu thereof be allowed out of his estate, so far as may be done consistently with the preservation of the rights of each, and also that a fair division shall be made, taking into consideration the relative wants, circumstances, and neces-

sities of each, of the property accumulated by their joint efforts and savings. The policy of the law should be, and is, to do justice, and to give to the injured wife not merely what necessity but what justice demands. This has been so repeatedly recognized in the courts of this state that citation of authority elsewhere would seem unnecessary: *Reavis v. Reavis*, 1 Scam. 242; *Von Glahn v. Von Glahn*, 46 Ill. 184; *Stewartson v. Stewartson*, 15 Ill. 145; *Wilson v. Wilson*, 102 Ill. 300.

It will be found in practice that the allowance will, in many cases, have to be made upon the basis of the support and sustenance of the wife only, and growing out of the duty of the husband to suitably support and maintain her, as, where the wife has brought nothing to the husband and has contributed nothing to the accumulation of his estate, or where resort must be had to the future earnings of the husband, and the like cases. In this class of cases the rule has been adopted of treating the allowance as made upon the basis of support only, so that if the wife remarries and acquires other means of support, the alimony will be discontinued or reduced: *Stillman v. Stillman*, 99 Ill. 196; 39 Am. Rep. 21; *Ressor v. Ressor*, 82 Ill. 442; *Bremer v. Bremer*, 3 Swab. & T. 249; *Walling v. Walling*, 16 N. J. Eq. 389. And so, if she subsequently acquires property so that her means increase, or the faculties of the husband diminish, there may be a decrease of alimony. So, on the other hand, if the wife's wants and necessities increase, and the ability of the husband to pay be increased, there may likewise be an appropriate exercise of the power of the court in the increase of the allowance. In those jurisdictions where, by statute, there is to be a division of the property,—that is, where alimony is a portion of the husband's estate allotted to the wife,—remarriage or obtaining other means of support will not afford grounds for a reduction of alimony: *Miller v. Clark*, 23 Ind. 370; *Albee v. Wyman*, 10 Gray, 222. Under our statute the court may make such allowance in the nature of alimony as, from the nature of the case, shall be fit, reasonable, and just, taking into consideration the circumstances of the party. Preference is expressed in many of the cases determined in this court for the practice of making the allowance payable in installments; but the right and power of the court to award alimony in gross, in appropriate cases, is clearly recognized. Under our practice, whatever be the basis upon which the alimony is allowed, it is

ordinarily of a sum payable in installments, as was done in this case.

There is a marked difference in respect of the property rights of the wife under our law and at common law. The wife is liable, under our statute, if she have a separate property, in common with the husband, for necessities furnished the family. The husband and wife are placed upon an equal footing in respect to the interest each may have in the estate and property of the other, and husband and wife may contract with each other, and she with strangers, as if she were sole. In case of divorce the courts look at the standing of the parties, the conduct of each, and from whence the estate is derived, and, having due regard to the living of each, will make such allowance to the wife as is reasonable and just. There is neither reason nor authority for holding that where the allowance has been thus made, either has the right to complain of the subsequent conduct of the other. The wife may owe, as contended, a duty to society, of which the husband is a member, to lead an exemplary life; but her allowance has been fixed upon the state of facts existing at the time of the rendition of the decree,—by the determination of what was then just and equitable, in view of the property rights of each. And the same is undoubtedly true where the property has been accumulated by the joint effort and economy of the husband and wife, and the allowance has been made to her upon the basis of a reasonable and equitable division of the estate. It may be true that the husband, in such cases, has been the apparently efficient means of its accumulation; yet if she has performed her duties as his wife faithfully, giving him her life, her care, strength, and prudent management, it can no more be said that the estate is the result of his labor than it is of her labor. Conceding the general duty she owes society, what right does it give the husband to property justly hers, if she violates that duty? The husband owes a like duty to lead a moral and virtuous life. If he fails to perform it, could it be contended that it would give her a right to additional property, or that there should be an increase in her allowance in consequence? Manifestly not. In *Forrest v. Forrest*, 3 Bosw. 661, it is held that after the divorce the wife owes no duty to the husband, and subsequent adultery is no cause for making a change in the allowance of alimony. In *Holt v. Holt*, 1 L. R. Pro. & D. 609, it was held that support by a paramour, with whom the wife was living, was an an-

swer to an application by the wife for alimony while the support continued, but not after it ceased. In *Cross v. Cross*, 63 N. H. 444, the court refused to interfere upon the ground of subsequent adultery, but puts its ruling upon the express ground that it did not appear but that the alimony had been allowed by way of restitution of property to the wife.

Cases may be found, and others will arise in practice, where it may be highly unjust and inequitable that the husband should continue to support the wife. It is within the power of the court to compel the payment of alimony out of the future earnings of the husband, whether the labor be manual or mental: *Foot v. Foot*, 22 Ill. 425; and it might be, under these circumstances, unconscionable to compel the husband, by his daily labor, to support his divorced wife in idleness and prostitution. Not only reasons of justice, but authority, would seem to justify the court in such a case, in the exercise of its general chancery powers, to modify or revoke its former order. But there is no such case made by this petition. The courts will not interfere to alter or modify allowances of alimony except in cases where equity calls clearly for the interposition. For aught that appears in this petition the entire property of the petitioner may have come from the wife, or been the result of their joint earnings and accumulations, and the court, in making the allowance, may have been making simple restitution, either for property brought to the husband or for assistance in its accumulation. In either view, the allowance should not be taken away, though her conduct be flagrant. Moreover, the rule is well settled that upon applications of this kind it is incumbent upon the husband to show that the circumstances justifying the reduction were not produced by his fault or misconduct. An allowance was here made, commencing June 1, 1885. Two years and four months and over had elapsed before this application was made; yet out of the twelve hundred dollars due under the decree but two hundred had been paid, leaving one thousand dollars, and over, unpaid by the petitioner, in violation of the decree of the court. It is not alleged or shown that the wife had other means of support, nor does it appear that she had the means or ability to compel the petitioner to comply with the decree. Sufficient has not been set forth to show, if it be true that this woman has led a vicious life, that it is not the result of want and penury, which the petitioner might have relieved, but refused. He does not come into court with clean hands, and will not

be permitted to ask relief from a decree of which he is in contempt. Before he should be permitted to be heard he should be required to comply with the order of the court up to the time of his application.

The petition was properly dismissed, and the judgment of the appellate court will be affirmed.

MARRIAGE AND DIVORCE — ALIMONY — ALTERING ALLOWANCE. — The courts of Arkansas exercising sound discretion, will allow alterations to be made in whatever provision might have been before made touching alimony allowed the wife upon the application of either party: *Bauman v. Bauman*, 18 Ark. 320; 68 Am. Dec. 171, and note; and so under the Vermont statute the court may grant the wife alimony in addition to the amount given her in the former decree: *Buckminster v. Buckminster*, 38 Vt. 248; 88 Am. Dec. 652, and extended note; *Ex parte Spencer*, 83 Cal. 460; 17 Am. St. Rep. 266.

MARRIAGE AND DIVORCE — ALIMONY — ASCERTAINING THE AMOUNT. — The court in ascertaining the amount of alimony, will regard the circumstances of the parties, the husband's earnings or ability to earn money: *Ex parte Spencer*, 83 Cal. 460; 17 Am. St. Rep. 266, and note, and the court will also consider the estate of the wife: *Small v. Small*, 28 Neb. 843. See extended note to *Methwin v. Methwin*, 60 Am. Dec. 671.

MARRIAGE AND DIVORCE — EFFECT OF REMARRIAGE ON ALIMONY. — The remarriage of a divorced wife to whom alimony has been granted is a valid ground for revoking or reducing alimony, it not appearing that the new husband is not able to support her: *Stillman v. Stillman*, 99 Ill. 196; 39 Am. Rep. 21, and note. See also *Butler v. People*, 125 Ill. 641; 8 Am. St. Rep. 423.

BINGEL v. VOLZ.

[142 ILLINOIS, 214.]

WILLS — REFORMATION OF. — Equity will not entertain a bill to reform a will.

WILLS — CORRECTION OF AMBIGUITIES IN. — When a testator devises land which he does not own, accurately describing it, a bill in equity will not lie to construe the will on the ground of mistake and to substitute another tract of land owned by the testator in the place of the one devised.

WILLS CONSTRUED ACCORDING TO LANGUAGE USED. — In construing a will the purpose is to arrive if possible, at the intention of the testator, but the intention sought for is not that which existed in the mind of the testator, but that which is expressed by the language of the will, and while in construing a will reference may be made to surrounding circumstances for the purpose of determining the objects of the testator's bounty, or the subject of disposition, and thus place the court, so far as possible, where it may interpret the language used from the standpoint of the testator at the time he employed it, still surrounding circumstances cannot be resorted to for the purpose of importing into the will any intention which is not there expressed.

WILLS — PAROL EVIDENCE TO VARY. — Parol evidence is not admissible, either to contradict, add to, or explain the contents of a will, even when the consequence is a partial or total failure of the testator's intended disposition.

WILLS — CONSTRUCTION — DESCRIPTION OF LAND. — When a will devising land contains several descriptions or elements thereof all of which are necessary to the identification of the property, intended to be devised, it will be void if no property of the testator can be found which will correspond with every part of the description; but if the intention as gathered from the will does not make it necessary to satisfy all the elements of the description, or if parts of the description are inconsistent with the other parts, and enough of them are consistent to identify the property, whatever is repugnant may be rejected, and the will enforced under this construction.

Happy and Travous, for the appellant.

E. F. Springer and Wise and Davis, for the appellees.

BAILEY, J. On the nineteenth day of August, 1887, John Volz died, leaving him surviving his widow and six children, five sons and one daughter, and also leaving a last will and testament as follows: —

“I, John Volz, of Alhambra, county of Madison and State of Illinois, farmer, being of sound mind, memory, and understanding, do make and publish this my last will and testament, hereby revoking and making void all former wills by me at any time hertofore made: —

“First. I wish my funeral expenses and debts, if any, paid at an early day.

“Second. I give, bequeath and devise to my wife, Barbara Volz, all my personal estate of every nature and kind, wherever situated, during her natural lifetime.

“Third. I give, bequeath, and devise to my oldest son, John Volz, four hundred dollars (\$400), to him paid by my son Joseph Volz, as hereinafter mentioned.

“Fourth. I give and bequeath and devise to my son Peter Volz one thousand dollars (\$1000), to him paid by my son Joseph Volz, as hereinafter mentioned.

“Fifth. I give, bequeath, and devise to my son Fritz Volz five (\$5) dollars, to him paid by Barbara Volz, his mother, out of the personal property, as hereinafter mentioned.

“Sixth. I give, bequeath, and devise to my son Joseph Volz my homestead of ninety (90) acres, described as follows, to wit: The south one half of the northwest quarter, containing eighty acres, more or less, and also ten (10) acres off of the north side of the north one half of the southwest quarter

(adjoining the south one-half of the northwest quarter), all in section number sixteen (16), township number five (5), range number six (6), west of the third principal meridian, Madison County and state of Illinois. My said son Joseph Volz to pay my said son John Volz four hundred dollars, and also my said son Joseph Volz to pay my said son Peter Volz one thousand dollars, within two years after my death, and that of my wife, Barbara Volz.

"Seventh. I give, bequeath, and devise to my son Adam Volz five dollars (\$5), to him paid by Barbara Volz, his mother, out of the personal property.

"Eighth. I give, bequeath, and devise to my daughter, Elizabeth Bingel, seventy (70) acres off of the south side of the north one half of the northwest quarter of section number sixteen (16), township number five (5), range number six (6), west of third principal meridian, county of Madison and state of Illinois.

"Ninth. My wife, Barbara Volz, to retain or hold her dower in the real estate during her natural lifetime, receiving the rent from said real estate and to pay the taxes, after her death the before described real estate to remain as hereinbefore mentioned.

"In witness whereof I have signed and published and declared this instrument my will, at Alhambra, county of Madison, Illinois, this thirteenth day of August, A. D. 1887.

"JOHN VOLZ. (Seal.)"

The testator, at the time of his death, was the owner of one hundred and sixty acres of land in Madison County, being the south half of the northwest quarter, and the north half of the southwest quarter, of section sixteen, township five north, of range six west. At that time he did not own, and so far as appears never had owned, the seventy acres off from the south side of the north half of the northwest quarter of said section sixteen, which by said will was devised to his daughter Elizabeth or Lizzie Bingel. Said daughter now insists that, by mistake of the draftsman who drew up the will, the word "northwest" was inserted instead of the word "southwest," in the devise to her, and that, in view of the remaining language of the will, and of the circumstances surrounding its execution, it should be construed as devising to her the south seventy acres of the north half of the southwest quarter of said section.

Three of the brothers of said Lizzie Bingel executed to her

a quitclaim deed of the south seventy acres of the north half of the southwest quarter of said section reciting in said deed that it was "made for the purpose of removing the latent ambiguity in said will caused by using the word northwest instead of southwest in describing said land in said will." The widow of the testator having died, the two other brothers, Frederick and Adam Volz, filed their bill against their three brothers and their sister, Lizzie Bingel, for a partition of said south seventy acres of the north half of the southwest quarter of said section, alleging that said tract was intestate estate, and that upon the death of their father, it descended to his six children as tenants in common.

The three brothers who had quitclaimed to their sister filed a disclaimer. Lizzie Bingel answered and filed her cross bill, alleging that said John Volz, being the owner in fee of the seventy acres off from the south side of the north half of the southwest quarter of said section, by his last will and testament devised the same to her, by the designation and description of "seventy acres off the south side of the north one half of the northwest quarter of section number sixteen," etc.; that said John Volz, at the time of making said will, was the owner in fee of the one hundred and sixty acres of land first above described, and no other real estate, and that by said will he devised all of his real estate, except said seventy acres to Joseph Volz; that at the time of making said will, he did not own or suppose he owned or expected to become the owner of any interest in the tract to which the devise to said Lizzie Bingel, taken literally, would apply, and that he intended, by said will, to dispose of all his estate, real and personal, and supposed he had done so; that during his lifetime he was a farmer, and cultivated said one hundred and sixty acres of land owned by him; that said Frederick and Adam Volz, long prior to the making of said will, went to do and work for themselves, and refused to stay with or assist their father in the cultivation and management of said land, or otherwise, and were disposed to be disobedient, shiftless, and of unsteady habits, and to act in all things against their father's wishes; that John and Peter Volz, two of the other sons, also left their father a few years prior to his death and went to do and work for themselves, and were, at the time of making said will, residing in and engaged in business in the state of Kansas; that Joseph Volz, the remaining son, and the complainant in the cross bill, although being past their majority, remained with

their father and mother and assisted, worked, and cared for them up to the time of their respective deaths, and that for a number of years prior to the death of said John Volz, said Joseph Volz and the complainant were the only children who remained with or did anything for their said parents; that said last will and testament was written by Charles Reudy as draftsman, at the request of John Volz, and that as a part of the instructions from said John Volz, said draftsman was given the deeds by which said John Volz held the land owned by him, from which to obtain the description of the portions of said land to be devised to Joseph Volz and to said complainant respectively in writing said will; that in said deeds said lands were correctly described, but that in copying said description therefrom into said will, said draftsman erroneously and unintentionally wrote the word "northwest" instead of "southwest" in describing the quarter of said section in which the land devised to said complainant lay, which error was overlooked and the said will was so executed devising said seventy acres so owned by said John Volz to the complainant by said faulty description; that while on the face of the will the subject-matter of the devise is clear, yet by reason of the premises, there arises a latent ambiguity, and a cloud is thereby cast upon the complainant's title to said land; but that, by construing said will in the light of surrounding circumstances, it will appear that such devise referred to and vested in the complainant the lands owned by said John Volz and not devised to said Joseph Volz, and had reference to no other land or interest therein.

Said cross bill further represented that, in order to remove any ambiguity or uncertainty, or any cloud upon the complainant's title, arising from the failure of the testator to fully and accurately describe said land devised to the complainant, three of the complainant's brothers had executed to the complainant a quitclaim deed of said land with the proper description.

Said cross bill prays that evidence be heard touching the matters therein alleged, and in aid of the construction of said will, and that the court examine the language of the devise to the complainant in connection with the facts alleged, and construe and interpret its meaning in the light of surrounding circumstances at the time the will was made, and determine and define what lands, if any, the complainant took by said devise, and what land was referred to and intended by the

language there used, and decree that said will, by the language employed, devised to the complainant the said seventy acres off from the south side of the north half of the southwest quarter of said section, and that said land is the property of the complainant, and that complainants in the original bill have no interest therein or title thereto.

Frederick and Adam Volz answered, denying the equities of the cross bill, and the cause coming on to be heard on pleadings and proofs, evidence was introduced by the complainant in the cross bill substantially supporting the allegations therein contained, and on consideration of the pleadings and evidence, the court entered a decree dismissing the cross bill for want of equity, and awarding partition of said seventy acres of land in accordance with the prayer of the original bill. From that decree said Lizzie Bingel now appeals to this court.

The counsel for the appellant, while admitting that equity will not entertain a bill to reform a will, seems to us to be seeking to accomplish essentially the same thing under the guise of an attempt to construe the will. It is admitted that the terms of the devise to the appellant, on their face, are clear and unambiguous, and that they accurately describe a tract of land in existence, and capable of being readily identified, and which, if the testator had owned it, would have passed to the appellant by the terms of the will.

But it is insisted that when extrinsic evidence is applied to the devise, a latent ambiguity is raised, and that such evidence may therefore be resorted to for the purpose of explaining the ambiguity and showing what land the testator intended to devise to the appellant. The purpose of construction, as applied to wills, is unquestionably to arrive, if possible, at the intention of the testator, but the intention to be sought for is not that which existed in the mind of the testator, but that which is expressed by the language of the will. While in attempting to construe a will, reference may be made to surrounding circumstances, for the purpose of determining the objects of the testator's bounty, or the subject of disposition, and with that view to place the court, so far as possible, where it may interpret the language used from the standpoint of the testator at the time he employed it, still the rule is inflexible, that surrounding circumstances cannot be resorted to for the purpose of importing into the will any intention which is not there expressed.

On this subject, Mr. Jarman lays down the rule as follows: "As the law requires wills, of both real and personal estate, (with an inconsiderable exception), to be in writing, it cannot, consistently with this doctrine, permit parol evidence to be adduced either to contradict, add to, or explain the contents of such will; and the principle of this rule evidently demands an inflexible adherence to it, even where the consequence is a partial or total failure of the testator's intended disposition; for it would have been of little avail to require the will *ab origine* should be in writing, or to fence a testator around with a guard of attesting witnesses, if, when the written instrument failed to make a full and explicit disclosure of his scheme of disposition, its deficiencies might be supplied, or its inaccuracies corrected, from extrinsic sources": 1 Jarman on Wills, 409.

This court has long been committed to this doctrine. This question arose and was carefully considered in *Kurtz v. Hibner*, 55 Ill. 514, 8 Am. Rep. 665. There a devise to Elizabeth Kurtz described an eighty-acre tract in section thirty-two, and a devise to James Kurtz described a forty-acre tract in section thirty-one. Proof was offered that the testator, at the time of his death, owned but one eighty-acre tract, that being described precisely as was the devise to Elizabeth Kurtz, except that it was in section thirty-three instead of section thirty-two, and also that the devisee had been in the actual possession of said tract for a number of years, and upon the repeated promise of the testator in his lifetime that he would give her said tract, she had made valuable and lasting improvements thereon at her own expense. Evidence was also offered that James Kurtz, at the time of the death of the testator, was in actual possession of the forty-acre tract as the testator's tenant, and that the draftsman of the will, by mistake, inserted the word "one" after the word "thirty" instead of the word "two," thus devising to James land in section thirty-one instead of section thirty-two. This evidence was excluded, and this court, in sustaining said ruling, said:—

"The law requires that all wills of lands shall be in writing, and extrinsic evidence is never admissible to alter, detract from, or add to the terms of the will. To permit evidence, the effect of which would be to take from a will plain and ambiguous language, and insert other language in lieu thereof, would violate the foregoing well-established rule. For the purpose of determining the object of a testator's bounty, or

the subject of disposition, parol evidence may be received, to enable the court to identify the person or thing intended. In this regard, the evidence offered afforded no aid to the court. The devise is certain both as to the object and subject. There are no two objects,—no two subjects.”

The doctrine of this case has been repeatedly approved and reaffirmed in subsequent cases. Thus in *Starkweather v. American Bible Society*, 72 Ill. 50, 22 Am. Rep. 133, it was said: “The courts are so strict that they will not permit the terms of a will to be altered, even when the deviser has, by mistake, misdescribed the land in a devise, by substituting that which could be clearly proved to have been intended.” In *Bishop v. Morgan*, 82 Ill. 351, 25 Am. Rep. 327, the testator was the owner of forty acres of land, being the southeast quarter of the northeast quarter of a certain section, and by his will he devised to his son the southeast quarter of said section, “containing forty acres, more or less,” and it was held, on the authority of *Kurtz v. Hibner*, 55 Ill. 514, 8 Am. Rep. 665, that the mistake in the description could not be corrected by reference to extrinsic evidence, and that such correction could not be made by reference to the words, “containing forty acres, more or less,” used in the will. See also *Heslop v. Gatton*, 71 Ill. 528; *Emmert v. Hays*, 89 Ill. 11; *Bowen v. Allen*, 113 Ill. 53; 55 Am. Rep. 398; *Bradley v. Rees*, 118 Ill. 327; 55 Am. Rep. 422; *Decker v. Decker*, 121 Ill. 341.

We are aware that other courts, whose opinions are entitled to the highest consideration, have gone considerably farther than we have been disposed to do in holding that mistakes of the character of the one presented here constitute cases of latent ambiguity which may be explained, and, in effect, corrected by extrinsic evidence. It cannot be denied that decisions which so hold are based upon reasons which are at least plausible, and if the question were a new one in this state we might feel disposed to give them serious attention; but the contrary rule has long been in force here, and has become a rule of property, and a change now by judicial construction, which must necessarily be given a retroactive operation, would have the effect of unsettling titles of very considerable value, which rest upon the rule which we have heretofore laid down. We must therefore adhere to our former decisions, although, in particular cases, the result may be to defeat the real intentions of testators, which, by mistake

of those charged with drafting their wills, they have failed to adequately express.

But it is contended that the real intention of the testator in the present case, as shown by the extrinsic evidence, and his intention as expressed in the language of the devise, may be brought into harmony by rejecting a portion of the description of the land devised as repugnant, as was done in *Decker v. Decker*, 121 Ill. 341. The rule of construction here referred to is the one indicated by the familiar maxim, *falsa demonstratio non nocet*, and is applicable alike to the construction of deeds and wills. As applied to deeds, it is explained by Mr. Tiedeman in his treatise on real property as follows:—

“It is a general rule of construction that the deed should be so construed that the whole deed may stand and be enforced. If this is impossible, and the description contains several elements or descriptions, all of which are necessary to the identification of the property intended to be conveyed, the deed will be void if no property of the grantor can be found which will correspond with every part of the description; but if the intention, as gathered from the deed, does not make it necessary to satisfy all the elements of the description, or if parts of the description are inconsistent with the other parts, and enough of them are consistent to identify the property intended by the parties to pass, whatever is repugnant is rejected, and the deed is enforced under this construction”: Tiedeman on Real Property, sec. 829.

Doubtless, if there were repugnant elements in the description employed in the devise in question, and if the description, after rejecting a repugnant element, were complete in itself, so as to accurately and sufficiently describe the land intended to be described, that rule of construction might be adopted; but we are unable to see, and the ingenuity of counsel has been unable to point out, any way in which that rule of construction can be applied so as to work out the result sought to be attained. The description in the devise, as we have already seen, is in these words: “Seventy acres off of the south side of the north one half, of the northwest quarter, of section number sixteen, township number five, range number six, west of the third principal meridian, county of Madison and state of Illinois.” If it be admitted that there are repugnant elements in this description, it is impossible to see what repugnant element can be rejected so as to leave a description which will apply to the land which the appellant

claims. If we reject the words "northwest quarter," or "northwest," or "north," what remains does not apply to the land in question. The difficulty of the description, as it appears in the devise, is, that it substitutes "northwest" for "southwest" and the correction of the description, so as to make it apply to the right tract, requires not only that one of these words should be stricken out, but that the other should be inserted. It involves more than construction; it requires reformation, and in this state at least, courts of equity have persistently refused to entertain bills to reform wills.

We are of the opinion that the decree was proper, and it will therefore be affirmed.

WILLS — REFORMATION IN EQUITY. — A court of equity has no power to correct mistakes in a will: *Wood v. White*, 32 Me. 340; 52 Am. Dec. 654; *Goode v. Goode*, 22 Mo. 518; 66 Am. Dec. 630, and extended note, where the reforming and correcting of wills in equity is thoroughly discussed. The chancery powers of a court cannot be invoked to reform a will: *Sturgis v. Work*, 122 Ind. 134; 17 Am. St. Rep. 349.

WILLS — PAROL EVIDENCE TO VARY. — This subject is treated at length in *Heidenheimer v. Bauman*, 84 Tex. 174; 31 Am. St. Rep. 29, and note with the cases collected; also extended notes to *Chambers v. Watson*, 46 Am. Rep. 72; *Kurtz v. Hibner*, 8 Am. Rep. 669. As to the admissibility of parol evidence to establish a trust in a will, see extended note to *Towles v. Burton*, 24 Am. Dec. 413.

WILLS — SUFFICIENCY OF DESCRIPTION IN. — A mistake in the description in a will, either of the beneficiaries or the subject-matter, will not avoid the will if enough remains to show with reasonable certainty what was intended: *Seebrock v. Fedawa*, 33 Neb. 413; 29 Am. St. Rep. 488, and note.

WILLS CONSTRUED ACCORDING TO LANGUAGE USED. — A testator must express his intention in words appropriate and sufficient to express his real meaning, and if he uses technical words, their technical meaning must prevail, unless they are qualified by other words in the will: *Leathers v. Gray*, 101 N. C. 162; 9 Am. St. Rep. 30, and note. Certain words and phrases cannot be eliminated from a will and others supplied so as to make it conform to what may be supposed to be the real intent of the testator: *Sturgis v. Work*, 122 Ind. 134; 17 Am. St. Rep. 349, and note. Where the language in a will is plain and unambiguous, such language must prevail: *Warner v. Mittenberger*, 21 Md. 264; 83 Am. Dec. 573, and note; note to *Elliott v. Elliott*, 10 Am. St. Rep. 59.

WABASH RAILROAD COMPANY v. DOUGAN.

[142 ILLINOIS, 242.]

GARNISHMENT — USURY AS DEFENSE. — A garnishee in an attachment suit cannot set up usury in the indebtedness for which the judgment was rendered against the principal defendants, or otherwise impeach the consideration of such judgment. These matters are available only in favor of the principal debtors.

GARNISHMENT OF MONEY DUE IN ANOTHER STATE. — A railroad company organized and having its domicile in another state, but doing business in Illinois, is subject to garnishment in the latter state by a resident of such other state for a debt owing by it to another resident of that state, and the motives which prompt the garnishing creditor in thus pursuing his legal rights cannot be questioned.

GARNISHMENT OF MONEY DUE IN ANOTHER STATE — EXEMPTIONS. — When the wages of a nonresident debtor earned and payable in another state are sought to be subjected to garnishment in Illinois, the exemption law of that state and not of the state of the debtor's domicile will control in the absence of statute to the contrary.

SUIT by attachment by M. E. Dougan against J. O. Brown and G. P. Seymour, before a justice of the peace, to recover twenty-one dollars due on a note. The writ of attachment was issued on the ground that said defendants were nonresidents of the state of Illinois, but were residents of St. Louis, in the state of Missouri. The writ was returned *non est inventus* as to the defendants, but served on the Wabash Railroad Company as garnishee. Said company was organized and had its domicile in Missouri, but was doing business in Illinois, and owed Seymour the sum of eighty-four dollars as wages earned and payable in the state of Missouri. Other facts are stated in the opinion. Judgment in favor of plaintiff as against the garnishee, and the latter appealed.

George B. Burnett and George S. Grover, for the appellant.

A. Flannigen and M. Millard, for the appellee.

BAILEY, C. J. The answer of the garnishee not being traversed, must be taken as true, and the question presented by the appeal is whether, upon the facts disclosed by said answer, the judgment against the garnishee can be sustained.

So far as said answer seeks to set up usury in the indebtedness for which the judgment against the principal defendants was rendered, or otherwise to impeach the consideration of that judgment, its averments must be disregarded, as those matters are available only in favor of the principal debtors, and as they failed to make defense or introduce any evidence,

the judgment against them is conclusive as to the validity and amount of the claim for which said judgment was rendered.

The real contention is, that the trial court erred in refusing to allow Seymour the benefit of the exemption laws of the state of Missouri, which, if held to apply, would have placed the entire amount of the indebtedness of the garnishee to him beyond the reach of the writ of garnishment. The answer shows that the plaintiff and defendants in attachment were residents of the state of Missouri; that the indebtedness garnisheed was for wages earned by Seymour in Missouri during the thirty days next preceding the service of the writ and payable in that state, said Seymour then being the head of a family residing in said state; that by the laws of Missouri, said wages were exempt from attachment or garnishment, and that the plaintiff had come to this state and resorted to attachment and garnishment here, in fraud of the exemption laws of Missouri, and for the express purpose of evading said laws and of defeating the rights of Seymour thereunder. The garnishee is a consolidated railroad company, organized under the laws of the states of Illinois and Missouri, and having lines of railway and business offices in each of said states.

The questions thus presented seem to us to be settled in this state by former decisions of this court. In *Hannibal etc. R. R. Co. v. Crane*, 102 Ill. 249, 40 Am. Rep. 581, the question presented was as to the liability of a corporation of another state, doing business and having property in this state, to garnishment in the courts of this state, for a debt owing by it to a resident of the state of its domicile. There a railway company organized in the state of Missouri and having its principal place of business and all its railway tracks in that state, was, before and at the time of the service of the writ of garnishment, regularly running its trains across the river by a bridge into the city of Quincy in this state, and keeping an agent in that city. The indebtedness garnisheed was owing to one of the employees of the railway company residing in Missouri. It was held that such foreign corporation could be charged as garnishee in the courts of this state, and that the indebtedness sought to be reached by garnishment, though due to a resident of Missouri and payable there, was not local, but might be recovered here through the instrumentality of that process.

In *Mitchell v. Shook*, 72 Ill. 492, a resident of the state of Indiana commenced an attachment suit before a justice of

the peace of this state against a resident of Indiana who was temporarily in this state, having with him property which, by the laws of Indiana, was exempt from attachment. Both plaintiff and defendant lived in the same county in Indiana, and the defendant could easily have been found in the county where both he and the plaintiff resided. It appearing that the debt sued for was a just one and past due, it was held that there was nothing in the facts warranting a finding that the plaintiff was guilty of an abuse of process, or that he had sought the jurisdiction of a court of this state for a fraudulent purpose. In the opinion we said: "It is not pretended that nonresidents are, either by express enactment or the policy of the law, as declared by this court, excluded from our courts; and the proposition that the creditor cannot be guilty of an abuse of process, or of obtaining the jurisdiction of the court for a fraudulent or improper purpose, who only takes those steps for the collection of a *bona fide* debt, which the law itself permits, however zealous and vigorous he may be in so doing, needs no demonstration."

What seems to us to be substantially if not precisely the same question now before us was decided in *Mineral Point R. R. Co. v. Barron*, 83 Ill. 365. That was a garnishee proceeding commenced by E. G. Barron against the Mineral Point Railroad Company, to recover wages due from said company to James Barron. The company answered admitting its indebtedness to James Barron in the sum of forty dollars, but setting up in defense, that said James Barron was a resident of the state of Wisconsin, and the head of a family, residing with the same, and that, by the laws of that state, such wages were exempt from garnishment. We held that the question thus raised pertained to the remedy, and that while the validity of a contract is to be determined by the law of the place where it is made, the law of the remedy is no part of the contract, and that in respect to all questions as to form or methods, or conduct of process or remedy, the law of the place of the forum is applied; that the statute of Wisconsin which exempted said wages from garnishment was a law affecting merely the remedy when an action is brought in the courts of that state, but that it cannot be invoked where the remedy is sought to be enforced in the courts of this state; that the remedy must be governed by the laws of the state where the action is instituted. It was held, however, that the exemption of a certain amount of wages due the head of a family residing with the

same, provided for by the laws of this state, applied, and that only the residue, after deducting the amount of such exemption, was subject to garnishment.

The judgment in the present case was rendered in conformity with the rule thus laid down. The answer admitted an indebtedness of eighty-four dollars. From that sum the court deducted fifty dollars, the exemption given by our statute, and rendered judgment against the garnishee only for the residue, viz., thirty-four dollars.

But it is urged that the present case is distinguishable from *Hannibal etc. R. R. Co. v. Crane*, 102 Ill. 249, 40 Am. Rep. 581, in this, that in that case no claim was made that the plaintiff brought suit in the courts of this state in fraud of the exemption laws of the state of his domicile, while it is alleged in the answer in this case that the plaintiff fraudulently, and with the express and avowed purpose of evading the exemption laws of Missouri, and of depriving Seymour of said exemptions, came to this state and sought to avail himself of the process of our courts. It seems to us to be a sufficient answer to the distinction thus sought to be drawn, that, admitting the legal right of the plaintiff to come to this state and avail himself of such remedies as our laws afford, the motive by which he was actuated in so doing is immaterial. A party pursuing his legal rights in a legal manner, can not be called in question in respect to the motives which prompt him to action.

We are referred to some authorities in other states and particularly to the case of *Drake v. Lake Shore etc. R'y Co.*, 69 Mich. 168, 13 Am. St. Rep. 382, in which a rule different from the one heretofore laid down in this state and to which we feel ourselves constrained to adhere is adopted. In the case last mentioned it was held, that the rule of comity existing between the states, will not permit a creditor domiciled in another state, or his assignee, to avail himself of the process of a domestic tribunal for the purpose of evading the exemption laws of his own state. We have examined and considered with some care the grounds upon which that and other similar cases to which we have been referred are based, and are not disposed to say that the course of reasoning there presented is destitute of force. But we do not feel called upon to re-examine our former decisions for the purpose of determining whether the rule there laid down should be set aside or modified, especially in view of the fact that the legislature, since the rendition of the judgment of the trial court in this

case, has interposed, and by express legislation has established the rule by which all future cases involving the question here under consideration must be governed. The act to which we refer went into force July 1, 1891, and makes it a misdemeanor, punishable with fine, for any person, with intent to deprive a resident creditor of his rights under the exemption laws of this state, to send any claim or debt out of this state, to be collected by process of attachment or garnishment, when the person or corporation sought to be charged as a garnishee is within reach of the process of our own courts. The third section of said act provides that, whenever in any proceedings in any court of this state to subject the wages due to any person to garnishment, it shall appear that such person is a nonresident of this state, and that the wages earned by him were earned and payable outside of this state, the said person whose wages are so sought to be subjected to garnishment, shall be allowed the same exemption as is at the time allowed to him by the law of the state in which he so resides: Laws 1891, p. 141. This statute cannot apply to the present case or furnish any rule for its decision. But as it establishes the rule which must govern all future cases, we see no occasion for re-examining in this case the basis upon which our former decisions rest, but are disposed to adhere to the principles established in those decisions.

It follows that the judgment of the appellate court must be affirmed.

GARNISHMENT. — JURISDICTION OF COURT OF STATE WHERE NEITHER DEBTOR NOR CREDITOR RESIDES: See *Renier v. Hurlbut*, 81 Wis. 24; 29 Am. St. Rep. 850, and note. The property of a nonresident in the hands of another may be reached by garnishment, the property and the garnishee both being within the jurisdiction of the court: *Molynaux v. Seymour*, 30 Ga. 440; 76 Am. Dec. 662, and extended note.

GARNISHMENT — EXEMPTION. — Garnishment proceedings cannot be instituted in one state so as to deprive a laborer of the benefit of the exemption laws of the state of his residence when the wages are due in the latter state: *Drake v. Lake Shore etc. R'y Co.*, 69 Mich. 168; 13 Am. St. Rep. 382, and note. *Contra: Harwell v. Sharp*, 85 Ga. 124; 21 Am. St. Rep. 149, and note; *Carson v. Railway Co.*, 88 Tenn. 646; 17 Am. St. Rep. 921, and note; note to *Missouri Pac. R'y Co. v. Sharitt*, 19 Am. St. Rep. 146. For an extended discussion of the extraterritorial effect of exemption laws, see monographic note to *Mumper v. Wilson*, 2 Am. St. Rep. 240.

GARNISHEE'S DEFENSES: See extended note to *Hanna v. Lawing*, 13 Am. Dec. 341. A garnishee must be allowed the rights of any other party in court to make such defense as the law allows him against the party seeking to charge him with a liability: *Webb v. Miller*, 24 Miss. 638; 57 Am. Dec. 189, and note.

WOOD v. WILLIAMS.

[142 ILLINOIS, 209.]

STATUTE OF LIMITATIONS — LETTER AS EVIDENCE OF INDEBTEDNESS IN WRITING. — A letter assuming the existence of a previous contract and narrating what has been done under it, but not professing to be a statement of the whole contract in writing as previously made, nor professing to be itself the contemporaneous expression of a contract then being made, is not such evidence of an indebtedness in writing as is required to relieve the contract from the operation of the statute of limitations relating to written instruments but leaves it to be governed by such statute relating to parol contracts.

STATUTE OF LIMITATIONS — CONCEALMENT OF CAUSE OF ACTION — FRAUD OF AGENT. — A principal who has no knowledge of the fraud of his agent is not guilty of fraudulent concealment so as to prevent the running of the statute of limitations.

STATUTE OF LIMITATIONS — CONCEALMENT OF CAUSE OF ACTION — BURDEN OF PROOF. — When a party relies upon fraudulent concealment of a cause of action to take it out of the operation of the statute of limitations, the burden of proof is upon him to show that the opposing party can fraudulently conceal without some affirmative fraudulent act, or that he has committed some act of negligence so gross as to be equivalent to intentional fraud.

STATUTE OF LIMITATIONS — CONCEALMENT OF CAUSE OF ACTION — LIABILITY FOR AGENT'S FRAUD. — A party cannot be guilty of fraudulent concealment of a matter of the existence of which he has no knowledge so as to bring it within the operation of the statute of limitations, and if he employs an agent for the purpose of making and securing a loan only, he is not chargeable with the agent's fraudulent conduct subsequently and beyond the scope of his agency, of which the principal had no knowledge.

STATUTE OF LIMITATIONS. — FRAUDULENT CONCEALMENT OF CAUSE OF ACTION to take it out of the operation of the statute of limitations must be that of the party sought to be charged, and mere allegation or proof that it was the act of his agent will not be sufficient, unless he is in some way shown to have been instrumental in or cognizant of the fraud.

Rayburne and Barry, for the appellant.

John M. Scott and Charles L. Capen, for the appellees.

SCHOLFIELD, J. Two questions are presented by the arguments made in this case: 1. Is the letter set out in the third count of appellant's declaration a contract or instrument in writing within the meaning of section 16 of the statute of limitations; and 2. Is the replication of the fraudulent concealment of the cause of action, as pleaded, an answer to the plea of the statute of limitations? Both were answered in the negative by the courts below, and in our opinion they were correctly so answered.

1. Section 16 of the statute of limitations is: "Actions on

bonds, promissory notes, bills of exchange, written leases, written contracts, or other evidences of indebtedness in writing, shall be commenced within ten years next after the cause of action accrued." The words, "other evidences of indebtedness in writing," by a familiar rule of construction, do not extend to a different class than that included by the preceding particular enumeration: Potter's Dwarries on Statutes, 275; Sedgwick on Statutory Construction, 423; and can therefore have been intended to include only contracts whereof the parties intended to put the evidence in writing at the time they were made, and hence can have no application to verbal contracts sought to be proved by subsequent admissions in writing.

The letter set out in the third count of appellant's declaration is as follows:—

"BLOOMINGTON, ILL., July 17, 1882.

"MR. MILNER BROWN, Delavan, Ill.

"*Dear Sir:* We have to-day drawn papers for a loan of \$2,500, to be secured on one hundred and sixty acres of improved farm land in Livingston County, valued at \$6,400. The security is ample. We made the papers payable to Samuel D. Wood, and the loans bear seven per cent annual interest, payable July 1st each year. We get no commission from the borrower, and as agreed with you, Mr. Wood will receive six and one-half per cent interest net to him, and the other one-half of one per cent per annum, when interest is paid, comes to us for our trouble and expense in the matter. The title is all right, and the papers will be back here in a day or two, and if convenient you may send us the amount on the receipt of this, and oblige. Yours truly,

"WILLIAMS & BURR (A. B.)."

It is very clear that this does not purport to be the statement of a contract in writing previously made, nor does it profess to be itself the contemporaneous expression of a contract then being made. It assumes that a contract has been previously made, and it is a narrative of what has been done under such a contract. It assumes a previously understood relation between appellant and Brown, to whom the letter is addressed, and it expressly says there was a previous agreement between Brown and appellees, and it assumes that by that agreement the time for which the loan was to run was fixed, and also that it was thereby determined by whom the expenses incidental to the performing of the contract were to

be borne, and by whom the interest to become due on the loan was to be collected, for these were indispensable to making the loan, and they are not alluded to in the letter. The only thing that remained to be done by appellees (and that that even remained to be done is inference only) was the delivery of the note and mortgage to appellant. It is therefore impossible that the letter could have been intended to be the evidence of a contemporaneous contract, and in no view could it be evidence of a contract previously made, unless accompanied with parol evidence supplementing its omissions; but then, in legal estimation, the contract would be a verbal contract: Bishop on Contracts, sec. 164, and cases cited.

The cases cited by appellant are not analogous. In *Barney v. Forbes*, 118 N. Y. 580, there were express present undertakings of the parties fully set out in the letters. In *Bank of Owensboro v. Western Bank*, 13 Bush, 526, 26 Am. Rep. 211, there was first a request in writing by the cashier of the appellant bank, addressed to the cashier of the appellee bank, that the latter bank would invest "some means" for it "in good paper, at thirty, sixty, ninety, or one hundred days' time." Then there was the reply of the cashier of the appellee bank that he had on that day invested as requested, followed by subsequent explanations by letter, and so the writings clearly evidenced the beginning and each successive step in a finally consummated contract. In *Bradstreet v. Everson*, 72 Pa. St. 124, 13 Am. Rep. 665, the writing expressly acknowledged the receipt, for collection, of the acceptances, and this amounted, in legal effect, to an undertaking to collect. In *Critzer v. McConnel*, 15 Ill. 172, the receipt stated that "Bonesteel had received the money of McConnel for the purpose of being used to purchase for him and in his name a certain judgment specified, and in the receipt Bonesteel agreed to procure a transfer of the judgment to McConnel in ten days or to return the money, the judgment to be by McConnel transferred to Bonesteel at any time within one year, upon his paying him three hundred and thirty-six dollars therefor," and thus it was the complete statement of a present undertaking. In *Riddle v. Poorman*, 8 Pen. & W. 224, the receipt contained an express undertaking of the party signing it to collect.

In *Ames v. Moir*, 130 Ill. 582; *Plumb v. Campbell*, 129 Ill. 101; *Illinois Cent. R. R. Co. v. Johnson*, 34 Ill. 389; *Dunning v. Price*, 56 Ill. 338; *Abrams v. Pomeroy*, 18 Ill. 188; *McCloskey v.*

McCormick, 37 Ill. 66; and *Memory v. Niepert*, 131 Ill. 623; cited by counsel for appellant, there were distinct present undertakings expressed in the instruments in question, and no case has been cited that is analogous to the present case, and we do not believe that any well-considered case can be found where a writing like this letter has been held, of itself, alone, to be sufficient evidence of a "written contract," or sufficient "evidence of indebtedness in writing," as those words are employed in our statute, *supra*.

2. The replication of the plea of the statute of limitations is as follows, omitting formal beginning: —

"Because he says that the several causes of action, and each and all of them, were fraudulently concealed by the defendants from the knowledge of the plaintiff until within five years before the commencement of this suit; that said defendants, as agents of the plaintiff, accepted and undertook to loan two thousand five hundred dollars for plaintiff, to be secured on one hundred and sixty acres of improved farm land in Livingston County, Illinois, valued at six thousand four hundred dollars; that the security should be ample, and the title all right; that the defendants, in consideration of the annual payment to them by plaintiff of one-half of one per cent on said two thousand five hundred dollars during continuance of the loan, undertook to make said loan on the security aforesaid, to look after and care for the same, to collect the annual coupons of the borrower each year as they fell due; that defendants did not loan said money, but without the knowledge or consent of the plaintiff gave said two thousand five hundred dollars to Woodrow and Fursman, who were defendants' agents in soliciting and making loans; that Fursman, acting in the place of said defendants, as their agent, without the knowledge of the plaintiff, took said two thousand five hundred dollars given him by defendants, and turned over to defendants certain papers purporting to be the note of Patrick Carey for two thousand five hundred dollars, seven per cent interest, dated July 15, 1882, due July 1, 1887, payable to plaintiff, and of the mortgage purporting to have been executed by Carey and wife to secure said note on the southeast quarter of section one, township twenty-nine, north, range seven, east of the third principal meridian, in Livingston County, Illinois; that said papers were not the note and mortgage of said Carey and wife, but were false, fraudulent, and forged, and had been forged by said Fursman while representing the defendants;

that defendants afterwards delivered, through his agent, to the plaintiff, the forged note and mortgage, and then and there falsely stated and represented to the plaintiff that they had loaned said two thousand five hundred dollars to Patrick Carey, and the note was the note of Patrick Carey for two thousand five hundred dollars, due July 1, 1887, and said defendants falsely stated and represented to the plaintiff, that another paper which they had at the same time delivered to the plaintiff was the application of the said Patrick Carey for said two thousand five hundred dollars; that defendants stated that they would send the mortgage as soon as the record would be completed; that on September 4, 1882, they delivered to the plaintiff a false, fraudulent, and forged mortgage, and falsely stated and represented to plaintiff that it was the mortgage of Patrick Carey and wife to plaintiff, and that they had just received the same from the recorder's office; that the defendants, in July, 1883, paid to the plaintiff a sum of money equal to the amount of interest that defendants were to collect for plaintiff, and took up the interest coupon, thereby falsely representing that they had collected the interest of said Patrick Carey; that the defendants, in July, 1884, and on or about July 1 of each year thereafter, up to the year 1889, paid to the plaintiff a sum of money equal to the amount of interest defendants were to collect for plaintiff on the sum to be loaned, as aforesaid, and upon which payment defendants took up the interest coupon, thereby falsely representing that they had collected it from said Patrick Carey; that plaintiff, believing the statements and representations of the defendants to be true, and relying and acting on said statements as true, made no examination to discover whether said statements and representations were true or false, and did not discover that defendants had not loaned said money, two thousand five hundred dollars, as they had undertaken, until November 1, 1889, when he learned for the first time that the said papers were false, fraudulent, and forged, it being soon after Fursman had disappeared; that because of the relation existing between the plaintiff and the defendants, the plaintiff could not, by reasonable diligence, discover that any or either of the said causes of action existed in his favor against said defendants before the time he made the discovery aforesaid."

It will be observed that there is no averment here that appellees knew before 1889, that the note and mortgage were forged, or that the money which they paid to appellant as in-

terest upon the loan was paid out of their own means, or that it was not paid to them as interest upon the loan by Fursman or some one else, and believed by them to have been paid as interest on the loan by the borrower. The question raised by the replication is therefore, shortly stated, this: Are appellees guilty of concealing knowledge of the cause of action, within the meaning of our statute of limitations, by reason of the fact simply that Fursman concealed knowledge of his fraud,—in other words, is his concealment of such knowledge their concealment of it?

Section 22 of the statute of limitations is: "If a person liable to an action fraudulently conceals the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at any time within five years after the person entitled to bring the same discovers that he has such cause of action, and not afterwards."

Persons relying upon exceptions in a general statute must clearly show that their case is within them, and the onus is therefore upon appellant to show that a party can fraudulently conceal without some affirmative fraudulent act, or some act of negligence so gross as to be equivalent to intentional fraud. How appellees can be guilty of affirmative fraudulent concealment of a matter of the existence of which they themselves had no knowledge we are unable to comprehend. If it be conceded that appellees are chargeable with the fraud of Fursman in failing to make and secure the loan, the agency is not shown to have extended beyond making and securing the loan, and no theory of the law extends it to his subsequent fraudulent conduct. The rule is, the principal is responsible for the agent's acts, though unauthorized, within the limits and in the execution of the agency, though yet not beyond these: Bishop on Contracts, sec. 1112. And so we have held that the master is not liable for the willful or malicious torts of the servants unless they are in furtherance of the business of the master, or are subsequently ratified by him: *Johnson v. Barber*, 5 Gilm. 425; 50 Am. Dec. 416; *Tuller v. Voght*, 13 Ill. 277; *Oxford v. Peter*, 28 Ill. 434.

No negligence of appellees is set up in failing to control or supervise the acts of Fursman, or in failing to discover his fraud. It is said in Wood on Limitations, sec. 276, "The fraudulent concealment must have been that of the party sought to be charged, and a mere allegation or proof that it

was the act of his agent will not be sufficient, unless he is in some way shown to have been instrumental in or cognizant of the fraud"; and so it is expressly ruled by the supreme court of Michigan, in *Stevenson v. Robinson*, 39 Mich. 160, and such also is the effect of the ruling of this court in *Campbell v. Vining*, 23 Ill. 525, which was decided before the enactment of section 22 of the statute of limitations on common-law principles. A majority of the court there held that at common law fraud might be replied to a plea of the statute of limitations in an action at law, from which Mr. Justice Breese dissented; but the whole court held that Vining was not affected by the fraudulent conduct of his copayee in the promissory notes in controversy in concealing knowledge of their payment.

The judgment of the appellate court is affirmed.

LIMITATIONS OF ACTIONS — FRAUDULENT CONCEALMENT OF CAUSE OF ACTION. — A fraudulent concealment by the defendant that a cause of action has accrued to the plaintiff is a good replication to a plea of the statute of limitations, and is sufficient in law to avoid the plea of the statute: *First Mass. Turnpike Corp. v. Field*, 3 Mass. 201; 3 Am. Dec. 124; *Reeves v. Dougherty*, 7 Yerg. 222; 27 Am. Dec. 496, and note. That the statute of limitations does not protect a defendant who has fraudulently concealed the plaintiff's cause of action has been uniformly held by the equity courts in both England and America: *Munson v. Hollowell*, 26 Tex. 475; 84 Am. Dec. 582, and note; *Wear v. Skinner*, 46 Md. 257; 24 Am. Rep. 517. Fraudulent concealment will not stop the running of the statute, though the plaintiff is thereby prevented from knowing that his cause of action has accrued; the relief in such a case would be in equity: *Fee v. Fee*, 10 Ohio, 469; 36 Am. Dec. 103, and note. See also note to *Runyon v. Snell*, 9 Am. St. Rep. 842.

LIMITATIONS OF ACTIONS — FRAUDULENT CONCEALMENT — BURDEN OF PROOF. — A party relying on concealment to take a case out of the operation of the statute of limitations must aver the facts constituting the fraud and time of its discovery: *Douglas v. Corry*, 46 Ohio St. 349; 15 Am. St. Rep. 604, and note. See also *Lataillade v. Orena*, 91 Cal. 565; 25 Am. St. Rep. 219, and note.

AGENCY — CONCEALMENT BY AGENT — PRINCIPAL'S LIABILITY. — A principal is charged with the knowledge of his agent when the facts of which the agent has knowledge are within the scope of his agency, so that it was his duty to act upon them or communicate them to the principal: *Trentor v. Pothen*, 46 Minn. 298; 24 Am. St. Rep. 225, and extended note; *Follette v. Mutual Accident Ass'n*, 110 N. C. 377; 28 Am. St. Rep. 693, and note; *Burditt v. Porter*, 63 Vt. 296; 25 Am. St. Rep. 763, and note; *Mullanphy Sav. Bank v. Schott*, 135 Ill. 655; 25 Am. St. Rep. 401.

EVIDENCE OF CONTRACT — LETTERS. — A letter written by one party to a transaction, giving his version of it, and not answered by the other party, is not competent in evidence against the latter as an admission: *Learned v.*

Tillotson, 97 N. Y. 1; 49 Am. Rep. 508. See extended note to *Macloy v. Harvey*, 32 Am. Rep. 40-53. If a contract can be extracted from the correspondence between the parties upon the subject of the contract, the statute of frauds will be satisfied: *Austin v. Davis*, 128 Ind. 472; 25 Am. St. Rep. 456, and note.

ARGO v. COFFIN.

[142 ILLINOIS, 303.]

DEEDS — AVOIDING FOR WANT OF MENTAL CAPACITY — UNDUE INFLUENCE.

In the absence of proof of undue influence, and before an heir can set aside a deed made by his ancestor, on the ground of his mental incapacity, the heir must prove such a degree of mental weakness on the part of the grantor as amounts to imbecility and renders him incapable of understanding and protecting his own interests. The fact that such grantor is physically unable to look after his property, or that his mind is enfeebled by age or disease, is not sufficient if he still retains a full comprehension of the meaning, design, and effect of his acts at the time of the execution of the deed.

Lodge and Hicks, and S. R. Reed, for the appellant.

C. F. Mansfield, for the appellees.

BAKER, J. This is a bill in chancery filed by appellees, who are a portion of the heirs at law of John Argo, deceased, for the purpose of setting aside a deed made by said John Argo in 1879 to Alexander P. Argo, the appellant, to a tract of land containing one hundred and sixty-four acres, and for the further purpose of partitioning said land among the heirs of said deceased. The grounds upon which the bill proceeds are the alleged mental incapacity of John Argo in 1879 to execute a deed of conveyance, and the undue influence alleged to have been exercised by appellant and by his brother, Solomon Argo, in obtaining the execution of the deed in question. At the hearing the circuit court found the allegations of the bill to be true, and that the equities of the case were with the complainants therein, and rendered a decree in conformity with its prayer.

In the spring of 1879 John Argo was about eighty-seven years old, was in poor health and infirm, and quite childish, and was living on the one hundred and sixty-four acres of land in controversy, with his wife, who was the stepmother of appellant. He had, some years before that, parceled out all his other lands to his daughters and sons-in-law. His wife had, prior to that time, been sick for several months, and under the constant care of a physician, and the physi-

cian had rendered bills for his services and for medicines furnished, amounting to three hundred and seventy dollars, and John Argo was worried for fear the doctor would sue and get judgment, and sell a part of his farm. He was also indebted to his son, Alexander P. Argo, the appellant, in the sum of one thousand dollars, and to his only other son, Solomon Argo, in a like sum of one thousand dollars. He sent for W. B. Bunyard, a justice of the peace, who died prior to the commencement of this suit, and said Bunyard prepared a deed conveying said one hundred and sixty-four acres of land to appellant, and it was executed and acknowledged by John Argo and his wife. The land was worth thirty-five dollars an acre, or five thousand seven hundred and forty dollars in all, and the consideration for which it was deeded, and the consideration mentioned in the deed, was two thousand dollars, the one thousand dollars owing to appellant and the one thousand dollars due Solomon. The dower right of the wife of John Argo was expressly reserved in the deed.

William McKinley was living with John Argo and farming a part of the land. A few days before the deed was made he heard John Argo say that he was going to make a deed for the land to appellant, and he also testifies that he was called in from the field to witness the deed; that Mr. Bunyard, John Argo, and his wife were there; that the deed was lying on the table; that Mr. Argo requested him to witness it, and spoke in his usual tone of voice.

The deed was taken from the house by Bunyard, who then notified appellant and Solomon Argo that he had the deed, that it was to be delivered to appellant only upon his taking it in satisfaction of the indebtedness due him, and upon his assuming the one thousand dollars due Solomon, and taking up and delivering to him (Bunyard) the notes given by the father to Solomon, and upon his entering into a written agreement to let John Argo and his wife have and keep possession of the land, and rent and manage the same for their individual use and support, for the lifetime of John Argo, and said wife to have dower in the land if she survived her husband. A written agreement to the above effect was signed by all three of the parties, — appellant, John Argo, and Martha Argo, wife of John Argo. The notes of the grantor in the deed made to Solomon Argo were procured by appellant and delivered to Bunyard, and the deed thereupon delivered to appellant, and recorded. The three hundred and seventy dol-

lars due Dr. Knott was settled by notes signed by John, Martha, Alexander P. and Solomon Argo, and appellant afterward paid to Solomon the one thousand dollars that he had assumed. It also appears that John Argo had executed a will, attested by two witnesses, in 1874 or 1875, but that after the making of the deed of 1879 he burned it.

We have carefully read and examined the entire testimony contained in the record. It is too voluminous to consider in detail. It does not sustain the charge that either appellant or his brother Solomon exercised undue influence over their father in order to procure the making of the conveyance. They both testify, positively, that they did not have any conversation with their father in regard to making a deed, did nothing to induce him so to do, and were not present when it was made. The other testimony in the case is entirely consistent with these statements of theirs. Nor does the evidence show that the justice of the peace who made out the deed and took the acknowledgment used any improper means in order to induce the execution of a deed. It clearly appears that John Argo was too old and infirm to actively attend to business; that for several years he was confined to his own house and yard; that he was frequently down sick in bed; that he was often unable to attend to his own physical wants and needs, and that he was childish and fretful, and frequently took but little interest or concern in what was going on around him. This is, we think, as far as the evidence can fairly be said to go. Upon the question whether or not he had sufficient mental capacity to understand ordinary business affairs and comprehend the nature and effect of a deed, there was very great conflict in the opinions of the numerous witnesses who were examined. Upon this matter of opinion it is difficult, if not impossible, to tell upon which side the preponderance is. The law presumes every man to be sane until the contrary is proved, and the burden of proof rests upon the party alleging insanity: *Menkins v. Lightner*, 18 Ill. 282; *Guild v. Hull*, 127 Ill. 523. In *Lindsey v. Lindsey*, 50 Ill. 79, 99 Am. Dec. 489, this court said: "Before a complainant can claim a decree, in the absence of undue influence, he must show such a degree of mental weakness as renders a party incapable of understanding and protecting his own interests. The circumstance that the intellectual powers have been somewhat impaired by age is not sufficient, if the contracting party still retains a full comprehension of the meaning, design,

and effect of his acts." In *Kimball v. Cuddy*, 117 Ill. 212, we said: "The property owner, unless an idiot or lunatic, must be allowed to make his own division and disposition of his property. Nor does the fact that a party is physically unable to look after his property, or that his mind is enfeebled by age or disease — if not to the point of lunacy or imbecility — take from him this power." In *Willemin v. Dunn*, 98 Ill. 511, we said: "Mere mental weakness will not authorize a court of equity to set aside an executed contract, if such weakness does not amount to inability to comprehend the contract": *Wiley v. Ewalt*, 66 Ill. 26; *Stone v. Wilbern*, 88 Ill. 106; *English v. Porter*, 109 Ill. 285; and numerous other cases decided in this court are to like effect. And, the conveyance being made to a son, and under the circumstances of this case, and the dower of the wife being reserved, and also the use of the premises during the joint lives of the grantor and his wife, the fact that the land was conveyed for much less than its value, — for two thousand dollars, when it was worth over five thousand dollars, — affords no evidence whatever of mental imbecility: *Clearwater v. Kimler*, 43 Ill. 272; *Lindsey v. Lindsey*, 50 Ill. 79; 99 Am. Dec. 489; *Guild v. Hull*, 127 Ill. 523.

In the case at bar, we think that the facts that the grantor conceived the idea of deeding the farm to his son in order to prevent Dr. Knott from selling any part of it on execution; that several days before the execution of the deed he announced his intention to make the conveyance; that he asked McKinley to witness the deed; that he fixed the consideration in the deed at the amount of his indebtedness to his two sons; that he reserved therein the dower right of his wife; that he placed the deed, when executed, in the hands of the justice of the peace, with directions not to deliver it to appellant until appellant signed the written contract permitting him (the grantor) to retain the possession and use of the farm during the remainder of his life, and also delivered to the said justice the promissory notes that the grantor had made in favor of Solomon Argo, and that upon the execution and delivery of the deed he burnt and destroyed the will that he had made some four or five years before, clearly indicate that such grantor understood what he was doing, and comprehended the nature and effect of his acts, and of the deed which he signed and acknowledged.

Our conclusion is, that the decree of the circuit court was

erroneous. It is reversed, and the cause is remanded, with directions to dismiss the bill of complaint for want of equity.

Decree reversed.

DEEDS — AVOIDING FOR UNDUE INFLUENCE OR MENTAL INCAPACITY. — A deed will not be invalidated on the ground of undue influence unless the court is convinced that the grantor was not a free agent at the time the deed was executed: *Le Gendre v. Goodridge*, 46 N. J. Eq. 419; *Aldridge v. Aldridge*, 120 N. Y. 614. A deed executed by a weak man in very necessitous circumstances, by which he transferred his rights for a most inadequate price will be set aside: *Bunch v. Hurst*, 3 Desaus. Ch. 273; 5 Am. Dec. 551; *Kennedy v. Currie*, 3 Wash. 442. See *Corrigan v. Peroni*, 48 N. J. Eq. 607. Unless there has been fraud or undue influence, mere weakness of intellect resulting from old age or sickness is no ground for avoiding a deed: *Trimbe v. Trimbe*, 47 Minn. 389.

THORNDIKE v. THORNDIKE.

[142 ILLINOIS, 450.]

STATUTE OF LIMITATIONS — INJUNCTION AGAINST ACTION IN ANOTHER STATE.

A court of equity in Illinois, having jurisdiction will not enjoin a citizen of that state from prosecuting an action at law in another state against the estate of a deceased citizen of the former state upon a cause of action barred by the statute of limitations in that state, but not barred by such statute in the other state.

STATUTE OF LIMITATIONS — EQUITABLE RELIEF AGAINST. — Although courts of equity will ordinarily act in obedience and in analogy to the statute of limitations, yet they will also, in proper cases, interfere in actions at law to prevent the bar of the statute when it would be inequitable and unjust.

STATUTE OF LIMITATIONS IN EQUITY. — When an obligation is clear and its essential character has not been affected by lapse of time, equity will enforce a claim of long standing as readily as one of recent origin, as between the immediate parties to the transaction.

STATUTE OF LIMITATIONS — EQUITABLE RELIEF AGAINST. — The fact that the remedy at law is barred by limitation in one state as between residents thereof does not give a legal or equitable right to interpose such bar to an action between the same parties in another state against property therein and where the right of action is not so barred.

William Brown and John A. Bellatti, for the appellant.

Morrison and Whitlock, for the appellee.

SCHOLFIELD, J. The single question is here presented whether the fact that a citizen of this state is prosecuting a suit at law against intestate estate of a deceased citizen of this state, found in another state, upon a cause of action which is barred by our statute of limitations, but which is not barred by the statute of limitations in which the suit is being prose-

cuted, authorizes a court of chancery in this state, having jurisdiction of the person of the plaintiff, to enjoin him from further prosecuting his suit at law in the other state. The courts below decided, and as we think, correctly, in the negative.

The statute of limitations is a purely legal, as contradistinguished from an equitable defense, and although courts of equity will ordinarily act in obedience and in analogy to the statute of limitations, yet they will also, in proper cases, interfere in actions at law to prevent the bar of the statute where it would be inequitable and unjust: 2 Story's Equity Jurisprudence, sec. 1521. And so it has been held that where the obligation is clear, and its essential character has not been affected by the lapse of time, equity will enforce a claim of long standing as readily as one of recent origin, as between the immediate parties to the transaction: 13 Am. & Eng. Ency. of Law, 674, n. 5; *United States v. Alexandria*, 19 Fed. Rep. 609, and cases cited; *Reynolds v. Sumner*, 126 Ill. 58; 9 Am. St. Rep. 523. The fact that the remedy at law is barred here does not give even a legal, much less an equitable, right to interpose the bar in the action in the foreign state against the property therein: *Mitchell v. Shook*, 72 Ill. 492; *Mineral Point R. R. Co. v. Barron*, 83 Ill. 385; *Wabash R. R. Co. v. Dougan*, 142 Ill. 248, *ante*, p. 74.

No case has been cited, and we are aware of none, holding that it is inequitable for a party to prosecute a legal demand against another within any forum that will take legal jurisdiction of the case merely because that forum will afford him a better remedy than that of his domicile. To justify equitable interposition in a case like the present, it must be made to appear that an equitable right will otherwise be denied the party seeking relief.

The judgment is affirmed.

INJUNCTION TO RESTRAIN SUIT IN ANOTHER STATE. — A court of equity may enjoin a party in its jurisdiction from prosecuting a suit in another state: *Pickett v. Ferguson*, 45 Ark. 177; 55 Am. Rep. 545. Where the parties to an action are both residents of the same state, and the property sought to be attached is exempted by the laws of that state, an injunction will issue to restrain the prosecution in another state: *Keyser v. Rice*, 47 Md. 203; 28 Am. Rep. 448. A court of Illinois will restrain a person over whom it has jurisdiction from commencing suits in a foreign state; but after the suit has commenced in another state, the court will not interfere with it: *Harris v. Pullman*, 84 Ill. 20; 25 Am. Rep. 416. See extended note to *Cunningham v. Butler*, 56 Am. Rep. 663.

STATUTE OF LIMITATIONS — RELIEF FROM, IN EQUITY. — Where a party has, by his fraudulent acts, attempted to obtain an unconscientious advantage by the lapse of time, he will not be allowed to avail himself of the defense of the statute in a court of equity: *Phalen v. Clark*, 19 Conn. 421; 50 Am. Dec. 253, and note; *Bank v. Hill*, 10 Humph. 176; 51 Am. Dec. 693, and note on enjoining the pleading the statute of limitations. See note to *Neppach v. Jones*, 23 Am. St. Rep. 149. Equity will not adopt the limitation fixed by statute when there is some equitable reason why it should not: *Gillett v. Wiley*, 126 Ill. 310; 9 Am. St. Rep. 587, and note. Equity will not apply the statute where the suit would not have been barred in equity: *Gutch v. Foodick*, 48 N. J. Eq. 353; 27 Am. St. Rep. 473. Equity will not relieve from the operation of the statute where the bar has already attached, before an action has been commenced in a court of law or a court of equity: *Adams v. Guerd*, 29 Ga. 651; 76 Am. Dec. 624, and note.

JOSEPH SCHLITZ BREWING COMPANY v. COMPTON.

[142 ILLINOIS, 511.]

DAMAGES IN PERSONAL ACTIONS — MEASURE OF RECOVERY. — In personal actions, damages accruing after the commencement of the suit may be recovered if they are the natural and necessary result of the act complained of, and do not themselves constitute a new cause of action.

NUISANCE — MEASURE OF DAMAGES. — In cases of nuisances, or repeated trespasses, recovery can ordinarily be had only up to the date of commencement of suit, for the reason that every continuance or repetition of the nuisance or trespass gives rise to a new cause of action, for which successive suits may be brought.

NUISANCE — DAMAGES WHEN INJURY IS PERMANENT. — When permanent injury is caused by a lawful public structure, properly constructed and permanent in character, damages may be recovered in one suit for the whole injury, past and prospective.

NUISANCE — RECOVERY OF DAMAGES FOR, DOES NOT AUTHORIZE CONTINUANCE OF. — A legal obligation exists to remove a nuisance, and the law will not presume the continuance of the wrong, nor a license to continue a wrong, or a transfer of title to result from a recovery of damages for prospective misconduct. A recovery of damages arising from the erection of a private nuisance will not render the act or the continuance of the nuisance legal.

NUISANCE — DAMAGES FROM PRIVATE STRUCTURE. — When a private structure or other work on land is the cause of a nuisance or other tort, the law will not regard it as permanent, no matter with what intention it is built, and damages therefor can be recovered only to the date of the commencement of the action. This rule is here applied to the wrongful discharge of rain water from defendant's house upon plaintiff's land.

Palmer and Shutt, for the appellant.

Patton and Hamilton, for the appellee.

MAGRUDER, J. Proof was introduced of damage done to plaintiff's property after the commencement of the suit by

reason of rain storms then occurring. The defendant asked, and the court refused to give, the following instruction: "The court instructs the jury that the suit now being tried was commenced in the month of April, 1890, and that they are not to take into consideration the question as to whether or not any damage has accrued to plaintiff's property since the commencement of this suit."

The question presented is, whether plaintiff was entitled to recover only such damages as accrued before and up to the beginning of her suit, leaving subsequent damages to be sued for in subsequent suits, or whether she was entitled to estimate and recover in one action all damages resulting both before and after the commencement of the suit.

The rule originally obtained at common law was, that in personal actions damages could be recovered only up to the time of the commencement of the action: 3 Comyns's Digest, tit. "Damages D." The rule, subsequently prevailing in such actions, is that damages accruing after the commencement of the suit may be recovered, if they are the natural and necessary result of the act complained of, and where they do not themselves constitute a new cause of action: Wood's Mayne on Damages, sec. 103; *Birchard v. Booth*, 4 Wis. 67; *Slater v. Rink*, 18 Ill. 527; *Fetter v. Beale*, 1 Salk. 11; *Howell v. Goodrich*, 69 Ill. 556. In actions of trespass to the realty, it is said that damages may be recovered up to the time of the verdict: Comyns's Digest, 363, tit. "Damages D."; and the reason why, in such cases, all the damages may be recovered in a single action, is, that the trespass is the cause of action, and the injury resulting is merely the measure of damages: 5 Am. & Eng. Ency. of Law, 16, and cases cited in note 2. But in the case of nuisances or repeated trespasses, recovery can ordinarily be had only up to the commencement of the suit, because every continuance or repetition of the nuisance gives rise to a new cause of action, and the plaintiff may bring successive actions as long as the nuisance lasts: *McConnel v. Kibbe*, 29 Ill. 483; 33 Ill. 175; 85 Am. Dec. 265; *Chicago etc. R. R. Co. v. Moffitt*, 75 Ill. 524; *Chicago etc. R. R. Co. v. Schaffer*, 124 Ill. 112. The cause of action, in case of an ordinary nuisance, is not so much the act of the defendant, as the injurious consequences resulting from his act; and hence the cause of action does not arise until such consequences occur, nor can the damages be estimated beyond the date of bringing the first suit: 5 Am. & Eng. Ency. of Law,

17, and cases in notes. It has been held, however, that, where permanent structures are erected, resulting in injury to adjacent realty, all damages may be recovered in a single suit: 5 Am. & Eng. Ency. of Law, 20, and cases cited in note. But there is much confusion among the authorities, which attempt to distinguish between cases where successive actions lie, and those in which only one action may be maintained.

This confusion seems to arise from the different views entertained in regard to the circumstances, under which the injury suffered by the plaintiff from the act of the defendant shall be regarded as a permanent injury. "The chief difficulty in this subject concerns acts which result in what effects a permanent change in the plaintiff's land, and is at the same time a nuisance or trespass": 1 Sedgwick on Damages, 8th ed., sec. 94. Some cases hold it to be unreasonable to assume that a nuisance or illegal act will continue forever, and therefore refuse to give entire damages as for a permanent injury, but allow such damages for the continuation of the wrong as accrue up to the date of the bringing of the suit. Other cases take the ground that the entire controversy should be settled in a single suit, and that damages should be allowed for the whole injury, past and prospective, if such injury be proven with reasonable certainty to be permanent in its character: 1 Sedgwick on Damages, 8th ed., sec. 94. We think, upon the whole, that the more correct view is presented in the former class of cases: 1 Sutherland on Damages, 199-202; 8 Sutherland on Damages, 369-399; 1 Sedgwick on Damages, 8th ed., secs. 91-94; *Uline v. New York Cent. etc. R. R. Co.*, 101 N. Y. 98; 54 Am. Rep. 661; *Duryea v. Mayor*, 26 Hun, 120; *Blunt v. McCormick*, 3 Denio, 283; notes to *Cooks v. England*, 92 Am. Dec. 630; *Reed v. State*, 108 N. Y. 407; *Hargreaves v. Kimberly*, 26 W. Va. 787; 53 Am. Rep. 121; *Ottenot v. New York etc. R'y Co.*, 119 N. Y. 603; *Cobb v. Smith*, 88 Wis. 21; *Delaware etc. Canal Co. v. Wright*, 21 N. J. L. 469; *Wells v. New Haven etc. Co.*, 151 Mass. 46; 21 Am. St. Rep. 423; *Barrick v. Schifferdecker*, 123 N. Y. 52; *Silsby Mfg. Co. v. State*, 104 N. Y. 562; *Aldworth v. Lynn*, 153 Mass. 53; 25 Am. St. Rep. 608; *Town of Troy v. Cheshire R. R. Co.*, 23 N. H. 83; 55 Am. Dec. 177; *Cooper v. Randall*, 59 Ill. 317; *Chicago etc. R'y Co. v. Hoag*, 90 Ill. 339. We do not wish to be understood, however, as holding that the rule laid down in the second class of cases is not applicable under some circumstances, as in the case of permanent injury caused by lawful

public structures, properly constructed, and permanent in their character. In *Uline v. New York Cent. etc. R. R. Co.*, 101 N. Y. 98, 54 Am. Rep. 661, a railroad company raised the grade of the street in front of the plaintiff's lots, so as to pour the water therefrom down over the sidewalk into the basement of her houses, flooding the same with water, and rendering them damp, unhealthy, etc., and injuring the rental value, etc. In discussing the question of the damages to which the plaintiff was entitled, the court say: "The question, however, still remains, what damages? All her damages, upon the assumption that the nuisance was to be permanent, or only such damages as she sustained up to the commencement of the action? There has never been in this state, before this case, the least doubt expressed in any judicial decision that the plaintiff in such a case is entitled to recover only up to the commencement of the action. That such is the rule is as well settled here as any rule of law can be by repeated and uniform decisions of all the courts; and it is the prevailing doctrine elsewhere." Then follows an exhaustive review of the authorities, which sustain the conclusion of the court as above announced.

In *Duryea v. Mayor*, 26 Hun, 120, the action was brought to recover damages occasioned by the wrongful acts of one who had discharged water and sewage upon the land of another; and it was held that no recovery could be had for damages occasioned by the discharge of the water and sewage upon the land after the commencement of the action.

In *Blunt v. McCormick*, 3 Denio, 283, the action was brought by a tenant to recover damages against his landlord because of the latter's erection of buildings adjoining the demised premises, which shut out the light from the tenant's windows and doors; and it was held that damages could only be recovered for the time which had elapsed when the suit was commenced, and not for the whole term.

In *Hargreaves v. Kimberly*, 26 W. Va. 787, 53 Am. Rep. 121, the action was case to recover damages for causing surface water to flow on plaintiff's lot, and for injury to his trees by the use of coke-ovens near said lot, and for injury thereby to his health and comfort; and it was held to be error to permit a witness to answer the following question: "What will be the future damage to the property from the acts of the defendant?" the court saying: "In all those cases where the cause of the injury is in its nature permanent, and a recovery

for such injury would confer a license on the defendant to continue the cause, the entire damage may be recovered in a single action; but, where the cause of the injury is in the nature of a nuisance and not permanent in its character, but of such a character that it may be supposed that the defendant would remove it rather than suffer at once the entire damage, which it may inflict if permanent, then the entire damage cannot be recovered in a single action; but actions may be maintained from time to time as long as the cause of the injury continues."

In *Wells v. New Haven etc. Co.*, 151 Mass. 46, 21 Am. St. Rep. 423, where a railroad company maintained a culvert under its embankment, which injured land by discharging water on it, it was held that the case fell within the ordinary rule applicable to continuing nuisances and continuing trespasses; reference was made to *Uline v. New York Cent. etc. R. R. Co.*, 101 N. Y. 98, 54 Am. Rep. 661, and the following language was used by the court: "If the defendant's act was wrongful at the outset, as the jury have found, we see no way in which the continuance of its structure in its wrongful form could become rightful as against the plaintiff, unless by release, or grant, by prescription, or by the payment of damages. If originally wrongful, it has not become rightful merely by being built in an enduring manner."

In *Aldworth v. Lynn*, 153 Mass. 53, 25 Am. St. Rep. 608, where the action was for damages sustained by a landowner through the improper erection and maintenance of a dam and reservoir by the city of Lynn on adjoining land, the supreme court of Massachusetts say: "The plaintiff excepted to the ruling, that she was entitled to recover damages only to the date of her writ, and contended that the dam and pond were permanent, and that she was entitled to damages for a permanent injury to her property. An erection unlawfully maintained on one's own land, to the detriment of the land of a neighbor, is a continuing nuisance, for the maintenance of which an action may be brought at any time, and damages recovered up to the time of bringing the suit. . . . That it is of a permanent character, or that it has been continued for any length of time less than what is necessary to acquire a prescriptive right, does not make it lawful, nor deprive the adjacent landowner of his right to recover damages. Nor can the adjacent landowner in such a case, who sues for damage to his property, compel the defendant to pay damages for the

future. The defendant may prefer to change his use of his property so far as to make his conduct lawful. In the present case, we cannot say that the defendant may not repair or reconstruct its dam and reservoir in such a way as to prevent percolation, with much less expenditure than would be required to pay damages for a permanent injury to the plaintiff's land."

In the case at bar the defendant did not erect the house upon plaintiff's land, but upon his own land. It does not appear that such change might not be made in the roof, or in the manner of discharging the water from the roof, as to avoid the injury complained of. The first count of the declaration, by its express terms, limits the recovery for damages, arising from the negligent and improper construction of defendant's building, to such injuries as were inflicted "before the commencement of the suit." The second count was framed in such a way as to authorize a recovery of damages for the flow of water upon plaintiff's premises from some other cause than the wrongful construction of defendant's building; and accordingly plaintiff's evidence tends to show that the eaves trough, designed to carry off the water from the roof, was so placed as to fail of the purpose for which it was intended. It cannot be said that the eaves trough was a structure of such a permanent character that it might not be changed, nor can it be said that the defendant would not remove the cause of the injury rather than submit to a recovery of entire damages for a permanent injury, or suffer repeated recoveries during the continuance of the injury. The facts in the record tend to show a continuing nuisance, as the same is defined in *Aldworth v. Lynn*, 153 Mass. 53, 25 Am. St. Rep. 608. There is a legal obligation to remove a nuisance; and "the law will not presume the continuance of the wrong, nor allow a license to continue a wrong, or a transfer of title, to result from the recovery of damages for prospective misconduct": 1 Sutherland on Damages, 199, and notes.

The question now under consideration has been before this court. In *Cooper v. Randall*, 59 Ill. 317, the action was for damages to plaintiff's premises caused by constructing and operating a flouring mill on a lot near said premises, whereby chaff, dust, dirt, etc., were thrown from the mill into plaintiff's house; it was there held that the trial court committed no error in refusing to permit the plaintiff to prove that the dust, thrown upon his premises by the mill after the suit was

commenced, had seriously impaired the value of the property, and prevented the renting of the house; and we there said: "When subsequent damages are produced by subsequent acts, then the damages should be strictly confined to those sustained before suit brought." It is true that the operation of the mill, causing the dust to fly, was the act of the defendant; but it cannot be said that it was not the continuing act of the present appellant to allow the roof, or the eaves trough, to remain in such a condition as to send the water against appellee's house upon the occurrence of a rain-storm. Nor is appellant's house or eaves trough any more permanent than was the mill in the Cooper case.

In *Chicago etc. R'y Co. v. Hoag*, 90 Ill. 339, a railway company had turned its waste water from a tank upon the premises of the plaintiff where it spread and froze, and a recovery was allowed for damages suffered after the commencement of the suit; but it there appeared that the ice, which caused the damage, was upon plaintiff's premises before the beginning of the suit, and the damage caused resulted from the melting of the ice after the suit was brought. It was there said: "The injury sustained by appellee between the commencement of the suit and the trial was not from any wrongful act done by appellant during that time, but followed from acts done before the suit was commenced." Here the water which caused the injury was not upon plaintiff's premises, either in a congealed or liquid state, before the beginning of the suit, but flowed thereon as the result of rain storms, which occurred after the suit was commenced.

We think the correct rule upon this subject is stated as follows: "If a private structure or other work on land is the cause of a nuisance or other tort to the plaintiff, the law cannot regard it as permanent, no matter with what intention it was built; and damages can therefore be recovered only to the date of the action": 1 Sedgwick on Damages, 8th ed., sec. 93.

It follows from the foregoing observations that it was error to allow the plaintiff to introduce proof of damage to her property caused by rain storms occurring after the commencement of her suit, and that the instruction asked by the defendant upon that subject, as the same is above set forth, should have been given.

The judgments of the appellate and circuit courts are reversed, and the cause is remanded to the circuit court.

DAMAGES ACCRUING AFTER COMMENCEMENT OF SUIT. — WHEN RECOVERABLE: See extended note to *Cooke v. England*, 92 Am. Dec. 627-632.

NUISANCE — DAMAGES — UP TO WHAT TIME SHOULD BE ESTIMATED. — Damages are recoverable for the maintenance of a nuisance only up to the time of the bringing of the action: *Kinnaird v. Standard Oil Co.*, 89 Ky. 468; 25 Am. St. Rep. 545; *Aldworth v. City of Lynn*, 153 Mass. 53; 25 Am. St. Rep. 608, and note; *Pappenheim v. Metropolitan etc. R'y Co.*, 128 N. Y. 436; 26 Am. St. Rep. 486, and note; *Denver etc. Water Co. v. Middaugh*, 12 Col. 434; 13 Am. St. Rep. 224, and note. For an extended discussion of the recovery of prospective damages for nuisances, see the monographic note to *Hargreaves v. Kimberly*, 53 Am. Rep. 123.

DORSEY v. WOLFF.

[142 ILLINOIS, 569.]

NEGOTIABLE INSTRUMENTS — NOTE — DEFINITION. — A promissory note is a written promise by one person to pay another person therein named or order a certain sum of money at all events and at a time specified therein, or at a time which must certainly arrive. It is none the less negotiable because it is made payable on or before a named date.

NEGOTIABLE INSTRUMENTS — NOTES — WHAT DOES NOT CONSTITUTE. — An instrument for a specified sum of money, and also for the payment of something else, the value of which is not ascertained, but depends upon extrinsic evidence, is not a negotiable note.

NEGOTIABLE INSTRUMENTS. — NOTE PROVIDING FOR PAYMENT AFTER MATURITY of a certain rate of interest per annum not exceeding the legal rate is not made conditional by such provision, but remains negotiable.

NEGOTIABLE INSTRUMENTS — NOTE PROVIDING FOR ATTORNEY'S FEE AND INTEREST AFTER MATURITY. — A note otherwise negotiable, which contains a provision for the payment of a legal rate of interest after maturity, and also for the payment of a specified attorney's fee if the note is not paid at maturity and suit is brought thereon, remains negotiable notwithstanding such conditions.

NEGOTIABLE INSTRUMENTS — NOTE PROVIDING FOR ATTORNEY'S FEE — RIGHTS OF ASSIGNEE. — When a negotiable note provides that the maker is to pay a certain attorney's fee in case suit is necessary to collect the note, such fee to be collected in the suit on the note, or by a separate action, the agreement as to the attorney's fee passes to the indorsee or assignee of the note as a part thereof, and he may recover it either in a suit upon the note or in a subsequent and separate action.

NEGOTIABLE INSTRUMENTS — PROVISION FOR ATTORNEY'S FEE — USURY. — When a negotiable note provides for the payment of legal interest after maturity, and also for the payment of ten per cent of the amount due as an attorney's fee, to be recovered as part of the note, in case suit is brought to collect it after maturity, the provision for the attorney's fee does not render the note usurious in the absence of proof that such fee is unreasonable in amount.

Palmer and Shutt, for the appellant.

A. N. Yancey, for the appellee.

MAGRUDER, J. The main question presented by the assignments of error is whether or not the notes described in the declaration are negotiable instruments. It is claimed by the appellant, that the notes were made non-negotiable by the insertion therein of the written promise of the maker, that, if they were not paid when due and suit was brought thereon, he would pay ten per cent on the amount due thereon in addition, as an attorney's fee, and to be recovered as a part of the notes, or by separate suit; that the indorsements by the payee did not confer the right upon the indorsee to bring suit in his own name upon the notes; that, even if such indorsements should be held to have conferred upon the assignee the right to bring a suit upon the notes in his own name, it did not confer upon such assignee the right to bring a separate suit upon the stipulations or promises as to the attorney's fee.

Various definitions have been given of a promissory note. In general terms, it may be defined to be a written promise by one person to pay to another person therein named or order a fixed sum of money, at all events, and at a time specified therein, or at a time which must certainly arrive: *Lowe v. Bliss*, 24 Ill. 168; 76 Am. Dec. 742; *Chicago R'y Equip. Co. v. Merchants' Bank*, 136 U. S. 268; Story on Promissory Notes, 2; 3 Kent's Commentaries, 74; 2 Am. & Eng. Ency. of Law, 814. A note is none the less negotiable because it is made payable on or before a named date: *Chicago R'y Equip. Co. v. Merchants' Bank*, 136 U. S. 268; *Cisne v. Chidester*, 85 Ill. 523; *Ernst v. Steckman*, 74 Pa. St. 13; 15 Am. Rep. 542. An instrument for a specified sum of money, and also for the payment of something else the value of which is not ascertained but depends upon extrinsic evidence, is not a note: *Lowe v. Bliss*, 24 Ill. 168; 76 Am. Dec. 742. A note which provides for the payment after the maturity thereof of a certain rate of interest per annum not exceeding the legal rate, is not made conditional by such provision: *Houghton v. Francis*, 29 Ill. 244; *Reeves v. Stipp*, 91 Ill. 609; *Laird v. Warren*, 92 Ill. 204.

Applying these definitions to the notes mentioned in the declaration in this case, we find that each note is "a note for a sum certain payable at a fixed date": *Dietrich v. Bayhi*, 28 La. Ann. 767. The notes are not payable on a contingency because the maker has the option of paying on or before a certain date; nor are they conditional instruments because they contain the words, "with eight per cent interest per an-

num after maturity." The portion of each note, which precedes the stipulation or promise as to the attorney's fee, is in itself a complete promissory note. For example: the part of the first note, that goes before the provision for the fee, is as follows: "\$13,586.84. Bunker Hill, Ills., Dec. 31, 1885. On or before two years after date, for value received, we or either of us promise to pay to the order of George W. Belt thirteen thousand five hundred eighty-six and $\frac{84}{100}$ dollars, payable at the Banking House of Belt, Erce. & Co. in Bunker Hill, Ills., with eight per cent interest per annum after maturity," etc. "Here the sum, time of payment and payee are certain, and these are the essential characteristics of a promissory note," *Houghton v. Francis*, 29 Ill. 244.

The promise to pay the attorney's fee is a promise to do something after the note matures. It does not affect the character of the note before, or up to the time of its maturity, either as to certainty in the amount to be paid, or fixedness in the date of payment, or definiteness in the description of the person to whom the payment is to be made. The stipulation or promise as to the attorney's fee cannot, therefore, affect the negotiability of the note, because the negotiability of a promissory note is, for all practical purposes, at an end when it matures. Parties taking it after its maturity cannot claim to be innocent holders without notice of defenses, which may be set up by the maker against its collection. If the stipulation for an attorney's fee is of such a character as to make the amount to be paid at maturity uncertain or indefinite, the note cannot be regarded as negotiable so as to authorize a suit upon it by the indorsee, but where the stipulation does not have such an effect, its insertion in the note does not destroy the negotiability of the note.

When the amount to be paid at maturity is certain and fixed, the maker knows what he has to pay, and the holder knows what he is to receive, from the face of the note itself. Commercial paper is expected to be paid promptly when it is due. A stipulation for an attorney's fee, which is only to be recovered if the note is not paid when due and suit is brought upon it, can have no force except upon the maker's default. If he keeps his contract by paying his note at its maturity, he will not be obliged to pay the additional amount; and no element of uncertainty enters into the contract. By the stipulation, the maker offers to the holder an assurance of his own confidence in his ability to pay without suit, and thereby

adds to the value of the paper as promising less expense in its collection. It has been said, that "the additional agreement relates rather to the remedy upon the note, if a legal remedy be pursued, than to the sum which the maker is bound to pay; and that it is not different in its character from a cognovit, which, when attached to promissory notes, does not destroy their negotiability": Daniel on Negotiable Instruments, 4th ed., secs. 62, 62a. We do not think that the negotiability of the notes in this case was destroyed by the stipulations therein as to attorney's fees.

The view here expressed is sustained by the authorities. In *Nickerson v. Sheldon*, 33 Ill. 372, 85 Am. Dec. 280, the note contained this provision: "And we further agree, if the above note is not paid without suit, to pay ten dollars, in addition to the above, for attorney's fees." In that case, the plaintiff did not declare for the ten dollars, and hence the recovery was only for the principal and interest due on the note, but we held the note to be negotiable under the statute, and said: "The amount due by this note is absolutely certain and it possesses all the requisites of a negotiable instrument under the statute: *Stewart v. Smith*, 28 Ill. 397. There is no uncertainty as to the precise sum of money to be paid on the maturity of the note": *Bane v. Gridley*, 67 Ill. 388; *Gobble v. Linder*, 76 Ill. 157; *Barton v. Farmers' etc. Nat. Bank*, 122 Ill. 352.

In *Stoneman v. Pyle*, 35 Ind. 103, 9 Am. Rep. 637, the note contained a stipulation for the payment of attorney's fees should suit be instituted thereon, and it was said: "We see no reason, on principle or authority, or on grounds of public policy, for holding that such a stipulation destroys the commercial character of paper otherwise having that character. . . . So here the defendant had the right to pay the face of the note when due and avoid the attorney's fees. As long as the note retained the peculiar characteristics of commercial paper, viz., up to the time of its maturity and dishonor, the amount to be paid on the one hand and recovered on the other, was fixed and definite": *Smock v. Ripley*, 62 Ind. 81.

In *Gaar v. Louisville Banking Co.*, 11 Bush. 180, 21 Am. Rep. 209, there was indorsed upon the back of an accepted bill of exchange an agreement by the drawers, indorsers, and acceptors thereof "to pay a reasonable attorney's fee to any holder thereof if the same shall hereafter be sued upon, and also pay interest at the rate of ten per cent per annum after

maturity until paid"; and it was claimed that the written agreement so indorsed upon the bill destroyed its negotiability on the ground that the amount of the attorney's fee was not ascertained, and hence that the bill was for an uncertain amount; but the court held otherwise and said: "The amount to be paid at maturity was fixed and certain, and it was only in the event that the bill was not paid when due, that any uncertainty arose. The reason for the rule that the amount to be paid must be fixed and certain is, that the paper is to become a substitute for money, and this it cannot be, unless it can be ascertained from it exactly how much money it represents. As long, therefore, as it remains a substitute for money, the amount, which it entitles the holder to demand, must be fixed and certain; but when it is past due, it ceases to have that peculiar quality denominated negotiability, or to perform the office of money; and hence, anything which only renders its amount uncertain after it has ceased to be a substitute for money, but which in nowise affected it until after it had performed its office, cannot prevent its becoming negotiable paper."

In *Seaton v. Scovill*, 18 Kan. 483, 26 Am. Rep. 779, a note for the payment of a certain sum "with interest at twelve per cent per annum after due until paid; also, costs of collecting, including reasonable attorney fees if suit be instituted on this note," was held to be negotiable, and Mr. Justice Brewer, delivering the opinion of the court, quoted with approval the above extract from the Kentucky case, and said: "The amount due at the maturity of the paper is certain; and the only uncertainty is in the amount which shall be collectible in case the maker defaults at the maturity of the paper in his promise to pay, and the holder is driven to the necessity of instituting a suit for collection, and then only as to the expenses of such collection."

In *Sperry v. Horr*, 82 Iowa, 184, each of the notes sued upon was for a certain sum and contained the following words: "with ten per cent interest until paid; if not paid when due, and suit is brought thereon, I hereby agree to pay collection and attorney fees therefor"; and the court held them to be negotiable, saying: "the attorneys' fees are not part of the sums due on the notes, but is an amount for which the maker may become liable when a legal remedy is enforced against him": *Shugart v. Pattee*, 37 Iowa, 422; *First Nat. Bank v. Breese*, 89 Iowa, 640; *Howenstein v. Barnes*, 5 Dill. 482;

Schlesinger v. Arline, 31 Fed. Rep. 648; *Wilson S. M. Co. v. Moreno*, 6 Saw. 35.

Inasmuch as the note is negotiable and passes by indorsement to the assignee, the agreement as to the attorneys' fee, also passes to such assignee as a part of the note. The stipulation or promise to pay the attorney's fee is not made with the payee alone. The note is payable to the payee or order. The promise is as much to the holder as to the original payee. The fee is to be paid if the note is not paid when due, whether it is then owned by the payee, or by any other holder. Moreover, the attorney's fee is an incident to the main debt and passes with it: *Bank of British North America v. Ellis*, 2 Fed. Rep. 44; 2 Daniel on Negotiable Instruments, sec. 62a; *Adams v. Addington*, 16 Fed. Rep. 89. The promise to pay it, thereby lessening the cost of collection in case of suit, gives the note currency as well as security, and is regarded as a provision for the indorsee or holder, as well as for the payee: *Bank of British North America v. Ellis*, 6 Saw. 96. Daniel in his work on Negotiable Instruments, vol. 2, sec. 62a, says: "When the added stipulation is deemed valid and the bill or note negotiable, such stipulation becomes a part of the acceptor's or indorser's contract, and need not be sued for by the attorney, but is recoverable by the holder of the instrument." See cases cited in note 8.

A further question arises as to the mode of enforcing the collection of the fee. It is said that it cannot be recovered in a separate suit if it is not embraced in the recovery on the note. Such seems to be the doctrine in Indiana: *Smiley v. Meir*, 47 Ind. 559. In a case in Iowa, also, where the note sued on contained a stipulation "to pay, in addition to the amount thereof, fifteen dollars attorneys' fees if the note is collected by suit," it was held, not to be the intention of the parties that the fee should become due only after the note was collected by suit, but to be their intention that the fee should be recoverable with the amount of the note: *Shugart v. Pattes*, 37 Iowa, 422.

In this state it has been held that the fee is not due when the suit is brought on the note, and therefore cannot be included in the assessment of damages: *Nickerson v. Babcock*, 29 Ill. 497; *Easter v. Boyd*, 79 Ill. 325. In the two cases, however, in which the court so held, there was no express agreement in the note that the fee might be recovered in a separate suit: *Nickerson v. Babcock*, 29 Ill. 497; *Easter v.*

Boyd, 79 Ill. 325. In the case at bar, the promise is "to pay ten per cent on the amount due hereon in addition as an attorney's fee and to be recovered as a part of this note, or by separate suit." Whether or not a stipulation to pay the fee to be recovered as a part of the note, in case suit is brought on it for its nonpayment when due, is so far a mere incident to the main debt that a separate suit cannot be brought for the fee after the termination of the suit on the note, is a question which is not presented by this record. We see no reason why the maker of the note may not stipulate that a separate suit may be brought for the fee, and why such stipulation cannot be enforced by the payee or the holder. If the written promise to pay the fee passes to the holder by the indorsement, the written agreement as to the mode of recovery also passes. The fact, that the engagement to pay a fee is incidental and ancillary to the main engagement to pay the debt, does not prevent the maker of the note from agreeing to submit to a separate suit for the recovery of the fee. We are therefore of the opinion that the present suit is properly brought.

It is further claimed, that the agreement to pay ten per cent as a fee is usurious. The authorities above referred to hold to the contrary: *Stoneman v. Pyle*, 35 Ind. 103; 9 Am. Rep. 637; *Wilson Sewing Machine Co. v. Moreno*, 6 Saw. 85. See also 2 Parsons on Notes and Bills, 413, 414; *Clawson v. Munson*, 55 Ill. 394; *Barton v. Farmers' etc. Nat. Bank*, 122 Ill. 352. There is here no violation of the usury law, because the agreement "provides for no new or additional compensation or interest for the use of the money because of the failure to pay at maturity. It is not in the nature of a contract for additional interest, but a provision merely against loss or damage to the payee (or holder) specifically pointed out": *Barton v. Farmers' etc. Nat. Bank*, 122 Ill. 352. There is nothing to show that ten per cent on the amount due is an unreasonable fee. The defendant stood by his demurrer to the declaration, which described the notes, and the provision therein for a fee of ten per cent. The declaration must therefore be regarded as alleging in substance, that a reasonable attorneys' fee was ten per cent on the amount due on the notes: *Smiley v. Meir*, 47 Ind. 559.

The judgment of the appellate court is affirmed.

NEGOTIABLE INSTRUMENTS — PROMISSORY NOTES — DEFINITION. — A written promise to pay a certain sum of money at a day certain for a valid consideration, is a promissory note: *Stegel v. Chicago etc. Sav. Bank*, 131 Ill. 569;

19 Am. St. Rep. 51; notes to *Gay v. Roobe*, 21 Am. St. Rep. 436, and *Chandler v. Carey*, 8 Am. St. Rep. 815; *Jennings v. First Nat. Bank*, 16 Am. St. Rep. 214, where the cases giving the definition of promissory notes are given. See also extended note to *Currier v. Lockwood*, 16 Am. Rep. 42.

NEGOTIABLE INSTRUMENTS — EFFECT OF STIPULATION TO PAY ATTORNEY'S FEE. — A stipulation in a negotiable instrument to pay all attorney's fees in case of a suit thereon, does not destroy its negotiability: *Bank v. Fagua*, 11 Mont. 285; 28 Am. St. Rep. 461, and note; *Montgomery v. Crescentbank*, 90 Ala. 553; 24 Am. St. Rep. 832, and note; *Bowie v. Hall*, 69 Md. 433; 9 Am. St. Rep. 433, and note. The following cases hold that a stipulation in a promissory note for the payment of an attorney's fee in case of a suit to enforce its payment, renders the note nonnegotiable: *First Nat. Bank v. Babcock*, 94 Cal. 96; 28 Am. St. Rep. 94, and note; *Altman v. Bittershofer*, 68 Mich. 287; 13 Am. St. Rep. 341. Such a stipulation in a note entitles the holder to recover the attorney's fee; *Bank v. Fagua*, 11 Mont. 285; 28 Am. St. Rep. 461.

NEGOTIABLE INSTRUMENTS — CONDITIONS AFFECTING NEGOTIABILITY: See *Iron City Nat. Bank v. McCord*, 130 Pa. St. 52; 28 Am. St. Rep. 166, and note with cases collected; note to *Jennings v. First Nat. Bank*, 16 Am. St. Rep. 214.

CASES
IN THE
SUPREME COURT
OF
KANSAS.

KLINE v. BANK OF TESCOTT.

[50 KANSAS, 91.]

NEGOTIABLE INSTRUMENTS.—CORPORATE NOTE INDORSED BY DIRECTORS—
PAROL EVIDENCE TO SHOW CAPACITY IN WHICH THEY SIGNED, WHEN
ADMISSIBLE.—The directors of a corporation who write their names upon the back of a corporate note, before its delivery, and append their official title to their signatures, may, as against the original payee or any subsequent holder who accepts the note as collateral security with full notice of all the facts and circumstances connected with its delivery, show by parol evidence that they indorsed the instrument merely as agents of the corporation and not in their individual capacity.

ACTION by the Bank of Tescott, against the Kanopolis Creamery Company and others, upon a promissory note of the following tenor:—

"\$950.

KANOPOLIS, Kas., June 1, 1888.

"Nine months after date, we promise to pay to the order of Western Creamery Building and Supply Company, nine hundred fifty dollars, at the Kanopolis State Bank, Kanopolis, Kas., with interest at the rate of twelve per cent per annum, from date until paid.

[Signed.]

KANOPOLIS CREAMERY COMPANY,

"No. 1120.

H. C. WAITE, *President,*

"Due March 1, 1889.

W. B. WOOLEY, *Secretary.*"

On the back of the note was:—

"W. F. KLINE,

WM. VANDEVENTER,

H. V. FABIS,

D. H. FUNK,

***Board of Directors.*"**

The petition charged and sought to hold as guarantors the persons whose names were thus indorsed upon the instrument.

Lafferty and Sternberg, for the plaintiffs in error.

Chipman and Maltby, for the defendant in error.

HORTON, C. J. On August 15, 1888, the discount committee of the Bank of Tescott accepted the note of the Kanopolis Creamery Company to the Western Creamery Building and Supply Company, of June 1, 1888, for nine hundred and fifty dollars, "as collateral." F. F. Scidmore, F. L. Scidmore, and M. B. Buell were partners, under the firm name of the Western Creamery Building and Supply Company. This company was also a stockholder in the Kanopolis Creamery Company, a corporation duly organized and existing under the laws of this state. F. L. Scidmore was a director of the Bank of Tescott. F. F. Scidmore was the cashier of the bank, and the discount committee of the bank consisted of F. F. Scidmore, T. E. Scidmore, and T. B. Seers. F. F. Scidmore was the person who secured the note sued on, and knew all the facts and circumstances under which it was executed and delivered, and was present with the discount committee of the bank when that committee acted upon and accepted the same. Under the rule in *Mann v. Second Nat. Bank*, 30 Kan. 412, we must treat the note as if this action were between the original parties only, as if no assignment or transfer had been made. The trial court held that the note upon its face was the note of the Kanopolis Creamery Company, and that Waite and Wooley executed it in their official capacity only, but that the parties who signed upon the back were liable personally as guarantors. If extrinsic evidence were not admissible, the ruling of the trial court would be correct. Under the authorities, if the parties who signed the note on the back, and who composed the board of directors of the Kanopolis Creamery Company, had signed the note upon its face, they could show they made it only in their official capacity as directors of the corporation.

"Where individuals subscribe their proper names to a promissory note, *prima facie*, they are personally liable, though they add a description of the character in which the note is given; but such presumption of liability may be rebutted, as between the original parties, by proof that the note was in fact given by the makers as agents, with the payee's

knowledge": Byles on Bills, 27, n. 1; *Haile v. Peirce*, 82 Md. 327; 3 Am. Rep. 139; *McWhirt v. McKee*, 6 Kan. 412; *Talley v. Burtis*, 45 Kan. 147.

In this case, it is claimed that if extrinsic evidence had been received, it would have shown the directors of the Kanopolis Creamery Company — the corporation — signed their names at the instance of F. F. Scidmore, one of the members of the Western Creamery Building and Supply Company, on the back of the note as officers of the corporation, and for the corporation only. It is claimed that F. F. Scidmore assured these directors that the only way to make a corporation note was for the officers and directors of the corporation to sign their names and affix their official positions thereto, and that the note was thus signed under his direction to bind the corporation, but not the officers individually. If the parties who wrote their names upon the back of the note as directors had signed their names upon the face thereof, they could have shown by extrinsic evidence that they were acting for the corporation only, and we perceive no reason why, as between the original parties or any subsequent holder of the note accepting the same as collateral, with full notice of all the facts and circumstances connected with the execution and delivery thereof, the same rule will not apply when such signatures are upon the back of the instrument before delivery.

In *Fullerton v. Hill*, 48 Kan. 558, it was ruled that "a stranger to a promissory note, who writes his name across the back thereof before it is delivered to the payee, incurs *prima facie* the liability of the guarantor. But parol proof may be received to show the exact liability of such indorser, by showing the agreement and understanding of the parties at the time of such indorsement": *Baker v. Chambles*, 4 G. Greene, 428; *Whitney v. Inhabitants of Stow*, 111 Mass. 368; *Souhegan Nat. Bank v. Boardman*, 46 Minn. 293; *Metcalf v. Williams*, 104 U. S. 93; *Good v. Martin*, 95 U. S. 90.

"Considerable diversity of decision, it must be admitted, is found in the reported cases where the record presents the case of a blank indorsement by a third party, made before the instrument is indorsed by the payee, and before it is delivered to take effect, the question being whether the party is to be deemed an original promisor, guarantor, or indorser. Irreconcilable conflict exists in that regard; but there is one principle upon the subject almost universally admitted by them all, and that is, that the interpretation of the contract ought

in every case to be such as will carry into effect the intention of the parties, and in most cases it is admitted that proofs of the facts and circumstances which took place at the time of the transaction are admissible to aid in the interpretation of the language employed": *Denton v. Peters*, L. R. 5 Q. B. 475; *Good v. Martin*, 95 U. S. 90.

We think that the parties who signed as directors had the right, at the trial, to give in evidence to the jury that the note in question was not their note as guarantors, but that it was the note of the Kanopolis Creamery Company only.

The judgment of the district court will be reversed, and the cause remanded for further proceedings in accordance with the views herein expressed.

NEGOTIABLE INSTRUMENTS — EXECUTION BY CORPORATE OFFICERS — PAROL EVIDENCE TO SHOW CAPACITY IN WHICH THEY SIGNED. — The signing of a negotiable instrument as an officer of a corporation may import either an individual or a corporate liability, and where there is nothing in the body of the instrument to show the nature of the obligation, parol evidence is admissible to determine its true character: *Kean v. Davis*, 1 Zab. 683; 47 Am. Dec. 182; *Pease v. Pease*, 35 Conn. 131; 95 Am. Dec. 225, and note; *Bean v. Pioneer Min. Co.*, 66 Cal. 451; 56 Am. Rep. 106. A note not in the corporate name and not disclosing any agency from the corporation to make it is *prima facie* not the note of the corporation, but evidence *alibis* may be introduced to rebut this presumption: *Melledge v. Boston Iron Co.*, 5 Cush. 158; 51 Am. Dec. 59, and note. A note commencing with "we promise to pay," signed with the name of the corporation and "F. Kraus, President," is the note of the company only, and parol evidence is not admissible to prove that the president did not sign the name of the company, but did sign his own name as a joint maker: *Liebscher v. Kraus*, 74 Wis. 387; 17 Am. St. Rep. 171, and note. To the same effect see *McCandless v. Belle Blaine Canning Co.*, 78 Iowa, 161; 16 Am. St. Rep. 429, and note.

PITKIN v. BENFER.

[50 KANSAS, 108.]

PARTNERSHIP — DORMANT PARTNER, WHEN NOT LIABLE. — Where the ostensible partner in a firm comprising two dormant partners, just before the date at which it is agreed that the dormant partners shall retire, orders goods in his own name from a person who does not acquire any knowledge of the existence of the partnership until long after its dissolution, and expressly directs that the goods shall not be shipped until after the day fixed for such dissolution, he alone is liable for the price, unless it is shown that the retiring partners have received the benefits of the transaction.

ACTION for goods sold and delivered. The material facts sufficiently appear from the opinion.

H. C. Solomon, for the plaintiffs in error.

Wells and Wells, for the defendants in error, *Settle and Keith*.

JOHNSON, J. It is insisted by plaintiffs in error that as *Settle and Keith* were dormant partners of the firm of *John Y. Benfer*, they are liable for the goods ordered during the existence of the partnership. It will be observed that while the goods were ordered during the continuance of the partnership, they were not to be shipped nor delivered until the partnership had expired. By agreement of the parties, the partnership was to be discontinued on the last day of February, 1888, and *Benfer* ordered the goods in his own name, to be shipped the day after the dissolution of the partnership occurred. It is true, as contended, that the persons who participate in the profits of a trade or business, ostensibly carried on by another, are liable for contracts made and credits given during the existence of the partnership. The credit is not presumed to have been given on the sole and separate responsibility of the ostensible partner, but binds all for whom the partner acts, if done in their business and for their benefit, to the same extent as though the partnership had been open and avowed. Here, however, no goods had been furnished, no sale made, nor was any credit given while the partnership existed.

Particular attention is called to the case of *Bromley v. Elliot*, 38 N. H. 287, 75 Am. Dec. 182, as being on all fours with the case at bar. In that case the goods were furnished and the credit given while the dormant partner was a member of the firm. He received the benefits of the transaction, and, according to all the authorities, was equally liable with the ostensible partner. The distinction in this case is, that the goods were not received while *Settle and Keith* were connected with the partnership, nor was it intended by *Benfer* that they should be shipped and delivered to the firm. Knowing that the partnership would expire with the month of February, *Benfer* ordered the goods in his own name, and particularly directed that they should not be shipped to him until the 1st of March, after the expiration of the partnership. It was evidently his intention that no sale or shipment would be made to the firm, and that delivery would be purposely deferred until he would have absolute control of the business. No benefits were received by *Settle and Keith*

from the transaction, nor was there any credit given to the firm for these goods while they were members of it. A dormant partner, when discovered, is liable to the same extent as an ostensible partner, but no further; and if the partnership had been open and avowed in this case, and its duration known, and Benfer had ordered goods in his own name to be shipped and delivered after the dissolution of the partnership, Settle and Keith would not have been liable for the value of the same. Judge Story, in speaking of the liability of dormant partners, remarks that, "of course, the retiring partner is not by his retirement exonerated from the prior debts and liabilities of the firm. In the first place, then, a dormant partner is not liable for any debts or other contracts of the firm, except for those which are contracted during the period that he remains a dormant partner. Upon his retirement, his liability ceases, as it began, *de jure*, only with his accession to the firm. The reason is, that no credit is, in fact, in such case given to the dormant partner. His liability is created by operation of law, independent of his intention, from his mere participation in the profits of the business, and therefore it ceases by operation of law as soon as such participation in the profits ceases, whether notice of his retirement be given or not": Story on Partnership, sec. 159. See also Parsons on Partnership, 3d ed., 451.

Here no liability was created until Settle and Keith had retired from the firm. The goods never came into the possession of the firm, nor was it the purpose that they should. They were sold to Benfer, and came into his individual possession as his own property, and he sold them as such. We think the court correctly held that he alone was liable for the price of the same.

The judgment of the district court will be affirmed.

PARTNERSHIP — LIABILITY OF DORMANT PARTNERS. — A dormant partner after he withdraws from the partnership, as to one who knows that he is a partner, continues to be responsible to the same extent that an ostensible partner would be under similar circumstances: *Lieb v. Craddock*, 87 Ky. 525. A dormant partner is liable to the full extent of an engagement in matters which according to the usual course of dealing have reference to the business transacted by the firm: *Brooks v. Washington*, 8 Gratt. 248; 56 Am. Dec. 142; *Bromley v. Elliot*, 38 N. H. 287; 75 Am. Dec. 182, and note; *Richardson v. Farmer*, 36 Mo. 35; 88 Am. Dec. 129, and note. The powers and liability of dormant partners are thoroughly discussed in the monographic note to *Brooks v. Washington*, 56 Am. Dec. 147-151.

DEMAREE v. SCATES.

[50 KANSAS, 275.]

PUBLIC OFFICERS, QUALIFICATIONS OF — ELIGIBILITY, MEANING OF. — Where a statute provides that "no person holding any state, county, township, or city office, or any employer, officer, or stockholder in any railroad in which the county holds stock, shall be eligible to the office of county commissioner," the word "eligible" signifies "legally qualified to hold office," and does not comprehend the two meanings, "capable of being elected," and "capable of holding office." Hence, even though a person may under the above provision be disqualified for the office of county commissioner at the time of his election, he is entitled to be inducted into the office if his disqualification is removed before the day appointed for entering upon his duties arrives.

ORIGINAL proceeding in *quo warranto* to test the right of the plaintiff to the possession of the office of county commissioner, which his predecessor refused to surrender to him on the ground that, at the time of his election, he was disqualified to hold the office.

Edwin A. Austin, for the plaintiff.

James K. Beauchamp, for the respondent.

T. S. Brown, of counsel.

HORTON, C. J. The principal question in this case is whether T. E. Demaree was eligible to take the office of county commissioner of Seward County on the ninth day of January, 1893. He was elected on the eighth day of November, 1892. At that time he was the treasurer of the township of Fargo of his county. Paragraph 1622, General Statutes of 1889, reads: "No person holding any state, county, township, or city office, or any employer, officer, or stockholder, in any railroad in which the county owns stock, shall be eligible to the office of county commissioner."

The contention is over the meaning that should be given to the word "eligible" in the statute. This word is determined by law and other standard lexicographers thus: Black: "Capable of being chosen"; "competency to hold office." Bouvier and Anderson: "This term relates to the capacity of holding, as well as that of being elected to an office." Abbott: "The term 'eligible to office' relates to the capacity of holding as well as the capacity of being elected." 19 Am. & Eng. Ency. of Law, 397: "Capable of being chosen"; "implying competency to hold the office, if chosen." Worcester: "Legally qualified"; "capable of being legally chosen." Webster:

"That may be selected"; "legally qualified to be elected and to hold office." Some law writers define the word as "legally qualified; as, eligible to office"; "legally qualified to hold office"; "electible"; "proper to be chosen"; "qualified to be elected."

Plaintiff contends that "legally qualified" is the proper definition of the word "eligible," as used in this statute. On the other hand, it is contended by the defendant that "eligible" means "proper to be chosen," "qualified to be elected," "that may be elected"; that is, the candidate for county commissioner must be eligible to the office at the time of the election.

It is a cardinal rule of construction that the words of a statute should be so construed as to carry out the purpose or intent of the lawmakers. Therefore, if a word in the statute has two or more definitions according to the standard lexicographers, that definition should be given in its construction that will best subserve the general purpose for which it was enacted. The literal or strict meaning of a word sometimes gives way to its general import. "The sense and reason of the law are the soul of the law": *Intoxicating Liquor Cases*, 25 Kan. 751; 37 Am. Rep. 284.

In *Privett v. Bickford*, 26 Kan. 52, 40 Am. Rep. 301, there was construed the provision of our constitution ordaining that no person who has ever voluntarily borne arms against the government of the United States shall be qualified to hold office in this state until such disability is removed by a vote of two thirds of all the members of both branches of the legislature. In that case it was said: "This provision operates upon the capacity of the person to take office, rather than as a disqualification to be elected to an office. So the disqualification is to the holding of the office, and not to the election. There is a marked distinction between a person who is ineligible or incapable of being elected, and one who may hold the office. . . . If our constitution provided that the plaintiff was ineligible to be elected, instead of being ineligible to hold office, the contention of the defendant would be good; but as the ineligibility is not as to the election, but only to the holding of the office, such ineligibility is cured by the subsequent removal of the disqualification."

Although the statute under consideration uses the word "eligible" instead of the words "qualified to hold office," contained in the provision of the constitution referred to, yet, if

"legally qualified to hold office" is the meaning that may be given to "eligible," the statute and the provision of the constitution may be construed alike, without difference; that is, as going only to the holding of the office. If the statute is a prohibition merely against any person holding any state, county, township, or city office, or any employer, officer, or stockholder in any railroad in which the county holds stock, from being elected to the office of county commissioner, then a person "eligible at the election," that is, "capable of being legally chosen," might be elected to the office of county commissioner, and afterwards accept a state, county, township, or city office, or become a stockholder in a railroad in which the county has stock. If "eligible" is to be construed as to the capacity of being chosen or elected, the statute would be of no actual benefit. It would permit that to be done which it was evidently the purpose of the lawmakers to prevent. They did not desire a county commissioner to hold another office, or that he should be a stockholder in a railroad in which his county is interested. They evidently intended to prohibit a county commissioner, while holding that office, from being a state, county, township, or city officer, and also intended to prohibit him, while holding such office, from being an employer, officer, or stockholder in any railroad in which his county owned stock. This was the evil sought to be avoided by the statute. Therefore, to construe the word "eligible" as meaning "legally qualified to hold office," seems to us to better subserve the spirit, as well as the letter, of the statute. Even if we should construe "eligible" as "electable," or "proper to be chosen," or "capable of being elected," then, to carry out the purpose of the statute, as already stated, we must also give "eligible" the additional definition of "legally qualified," or "capable of holding office," or of "acting as a member," because it will not comply with the spirit of the statute to rule that if a person is elected county commissioner, although eligible at the time of his election, he may, after his election, accept the other offices referred to in the statute, or become connected with a railroad in which the county owns stock. To give these two different definitions to the word "eligible" in the same statute, and at the same time, would be an unusual construction. Generally, a word in the same statute is not construed in two different ways. "It has been the constant practice of the Congress of the United States since the Rebellion to admit persons to seats in that

body who were ineligible at the date of their election, but whose disabilities had been subsequently removed": McCrary on Elections, sec. 311.

A person may, therefore, hold the office of county commissioner even if, when elected, he is disqualified under the provisions of the statute. If he becomes qualified after the election and before the holding, it is sufficient. Among the authorities which are generally cited to support the definition of "eligible" as meaning "the capacity of being elected," are *Carson v. McPhetridge*, 15 Ind. 327; *Howard v. Shoemaker*, 35 Ind. 111; and *Jeffries v. Rowe*, 63 Ind. 592. More recently (1883) these decisions have been carefully re-examined by the supreme court of Indiana, in *Smith v. Moore*, 90 Ind. 294. In that case, a provision of the constitution of Indiana was construed. That provision reads: "No person elected to any judicial office shall, during the term for which he shall have been elected, be eligible to any office of trust or profit under the state other than a judicial office."

"Eligible" was defined as meaning "legally qualified," and "eligible to any office," as used in the provision of the constitution, was construed as having reference to the qualification to hold office, and not to the choosing or election to such office. One of the judges, Elliott, J., dissented; but that judge, in the case of *Brown v. Goben*, 122 Ind. 113, decided, under all the circumstances, it was best to adhere to the decision in *Smith v. Moore*, 90 Ind. 294. He said in his opinion, among other things, that, —

"We conclude, therefore, that it must be held to be the settled law of this state that the disqualification must exist at the time the term of office begins, and that the right of the claimant is not affected by the fact that at the time of his election he was ineligible." The *syllabus* in that case reads: "The disqualification must exist at the time the term of office begins, the right of the claimant not being affected by the fact that at the time of his election he was ineligible."

In the case of *Vogel v. State*, 107 Ind. 374, the judge writing the opinion (Zollars, J.), speaking for the court, said: "The constitution provides that 'no person elected to any judicial office shall, during the term for which he shall have been elected, be eligible to any office of trust or profit under the state, other than a judicial office': Rev. Stats. 1881, sec. 176. That the office of justice of the peace is a judicial office, under our constitution and statutes, is well settled. It was

held in the case of *Smith v. Moore*, 90 Ind. 294, that a judicial officer may be elected to an office not judicial, the term of which will begin after the expiration of the judicial term; in other words, that the disability imposed by the constitution has reference to the taking and holding of the office, and not to the election. That case has been followed and approved in subsequent cases. Marks was eligible to take and hold the office of township trustee, if the term began after the expiration of his term as justice of the peace, although such term may not have expired at the time of the election."

A part of the *syllabus* reads: "A judicial officer may be elected to an office not judicial, the term of which will begin after the expiration of the judicial term, the disability imposed by the constitution merely having reference to the taking and holding of the office."

The court at that time consisted of five judges. The decision was unanimous. These decisions of Indiana referred to must be considered of greater force because the earlier decisions of that state construed "eligible to office" as relating "to the capacity of being elected." A more thorough examination of the whole subject induced that court to change its former decisions, and to construe "eligible" as "going only to the holding of the office," and not to mean "incapable of being chosen."

The case of *People v. Hamilton*, 24 Ill. App. 609, is in line with the later Indiana cases, and "eligible to the office of alderman" is construed to mean "legally qualified." The disqualification referred to in the statute in that case is construed to apply to the office and not the election.

In addition to the earlier Indiana cases, we are also cited to *Searcy v. Grow*, 15 Cal. 117, which was followed in *People v. Leonard*, 73 Cal. 230; *State v. Clarke*, 3 Nev. 566; *Taylor v. Sullivan*, 45 Minn. 309; 22 Am. St. Rep. 729; and *In re Corliss*, 11 R. I. 638; 23 Am. Rep. 538. The decisions in California and Nevada are commented upon in *Smith v. Moore*, 90 Ind. 294, and the reasoning by which the conclusions were reached in those cases was not satisfactory to that court. The same may be said of the reasoning in *Taylor v. Sullivan*, 45 Minn. 309, 22 Am. St. Rep. 729, as applied to the statute under consideration. In the Nevada case, which construes the word "eligible" as meaning "incapable of being legally chosen," the judge writing the opinion says: "The etymology of the word and the meaning generally given to it

by the best English authors would hardly justify this interpretation. But the word, as used in various state constitutions, seems to justify this broader and more comprehensive interpretation": *State v. Clarke*, 3 Nev. 566.

In the Rhode Island case, the language of the constitution is, "that no person holding an office of trust or profit under the United States shall be appointed an elector." The supreme court of that state construed the election by the people as constituting an appointment. With this construction, the disqualification in the constitution of Rhode Island strikes at the beginning of the matter; that is, it forbids an appointment or the election of an ineligible candidate. That case is therefore not in conflict with the views of this court.

The other objections made to Demaree's holding the office of county commissioner were not well taken.

In the case of *Rogers v. Slonaker*, 32 Kan. 191, Rogers's term of office as coroner did not expire until January 14, 1884. He attempted, while coroner, on January 12, 1884, before the expiration of his term, to act as county commissioner. He tried to hold these two offices at the same time. This cannot be done.

In *State v. Plymell*, 46 Kan. 294, Plymell was ineligible to the office of county commissioner because he continued to hold the office of city clerk. He attempted to discharge the duties of county commissioner. He also tried to hold two offices at the same time.

Forbes, who was elected to the office of township trustee to succeed Demaree, was notified of his election about the 18th of November, 1892. He qualified December 31, 1892. The acts relating to township officers make no provision for any of the offices therein named becoming vacant on the refusal or neglect of the officer elected to give the official bond within the time prescribed by law: *Jones v. Gridley*, 20 Kan. 584. On the 9th of January, 1893, at the time that Demaree appeared and demanded his office as a member of the board of county commissioners of Seward County from the third commissioners' district, he was "eligible"; that is, he was "legally qualified" to hold the office at that time. He had fully complied with all the provisions of the statute, and Scates should have surrendered to him the office.

The claim that Demaree offered to give a bribe to E. D. Haines, on the 8th of November, 1892, to procure his vote, we do not think is supported by the evidence. It is said that

Demaree agreed with Haines to use his influence to relocate a schoolhouse near the center of his school district in consideration that Haines would vote for him for county commissioner. Considering all the evidence, we do not think that Demaree bribed or attempted to bribe Haines by what he did about the relocation of the schoolhouse.

Judgment of ouster will be rendered against the defendant, with costs.

JOHNSTON, J., concurring.

ALLEN, J., dissented from the opinion of his colleagues. After alluding to the derivation of "eligible" from the Latin verb *eligere*, with the suffix "ible," which would seem to give the word, naturally, the signification of "able to be, or capable of being, chosen," he proceeded as follows: "In the passage of the statutory provision under consideration two purposes may have been in contemplation, — one, a prohibition on the officers and other persons rendered ineligible by the statute from being candidates at the election, and from being voted for at all; the other, a prohibition on the holding by one person of two offices, of the kinds mentioned, at the same time. The intention of the legislature is to be gathered mainly from the language used. It is fair to presume that members of the Kansas legislature have generally a fair understanding of the English language, and especially of the forcible, simple words derived from the Saxon. If the intention had been merely to prevent the holding of the office of county commissioner by a state, county, township, or city officer, or an employer, officer, or stockholder in any railroad, I apprehend there could hardly have been a member of either house to whom the simple Anglo-Saxon word 'hold' would not have suggested itself, and who would not have used it in preference to the word 'eligible.' The meaning of the section would then have been as the majority of this court construes it to be; but it would have read: 'No person holding any state, county, township, or city office, or any employer, officer, or stockholder in any railroad in which the county owns stock, shall hold the office of county commissioner.' Of course, it is not to be expected that the legislature will in every instance select words of the most clear and unequivocal meaning, yet it is not to be presumed that words are used in the statute without careful consideration of their force and meaning. On the contrary, it is to be presumed the legislature has selected the words it deems most apt to convey its meaning. The word 'eligible' cannot fairly be said to have a technical meaning in the law, different from its ordinary signification in the language. I think that not only the weight of reason, but of authority as well, is to the effect that the word 'eligible' has reference to the *status* of the candidate at the date of the election. The electors then make their choice; that choice should be made from those persons who are eligible, — fit to be chosen, worthy of choice. It does not seem reasonable that they should be required to take into consideration changes of condition which may or may not arise between the date of the election and the commencement of the term of office, but that the person, at the time of the election, should belong to the class of persons who are eligible. To this effect are the following cases: *Searcy v. Grow*, 15 Cal. 117; *State v. Clarke*, 3 Nev. 566; *Waldo v. Wallace*, 12 Ind. 569; *Gulick v. New*, 14 Ind. 93; 77 Am. Dec. 49; *Carson v. McPhetridge*, 15 Ind. 327; *in re Corlies*, 11 R. L. 638; 23 Am.

Rep. 538." The learned justice then reviewed several cases, expressing his agreement with *State v. Clarke*, 3 Nev. 566, and *Taylor v. Sullivan*, 45 Minn. 309, 22 Am. St. Rep. 729, as well as with the dissenting opinion in *Smith v. Moore*, 90 Ind. 307, which he considered "much more clear and convincing than that of the majority of the court," and concluded as follows: "It appears to me that the legislature has plainly said, in substance, that no person holding a township office shall be elected county commissioner. If the spirit of this law requires the court to hold that no person who, after election as county commissioner, though qualified at the time, shall hold both that and a township office at the same time, we still are not required to do away with the rule that is in terms declared in the statute. I perceive no inconsistency in the construction placed on the word by those courts which hold that the inhibition applies both to the time of the election and to the term of office."

OFFICERS — ELIGIBILITY — QUALIFICATION AFTER ELECTION. — One who is disqualified under the constitution to "hold office" at the time of his election is eligible if the disability was removed before the issuing of the certificate and the taking of the office: *Privett v. Bickford*, 26 Kan. 52; 40 Am. Rep. 301; *State v. Murray*, 28 Wis. 96; 9 Am. Rep. 489. The doctrine that the disability or ineligibility of a person to hold an office must be removed before his election, and not merely previous to his taking the office, is maintained by the following authorities: *Taylor v. Sullivan*, 45 Minn. 309; 22 Am. St. Rep. 729, and note; *In re Corliss*, 11 R. L. 638; 23 Am. Rep. 538; *Parker v. Smith*, 3 Minn. 240; 74 Am. Dec. 749. See also *De Turk v. Commonwealth*, 129 Pa. St. 151; 15 Am. St. Rep. 705, and note.

MCGARRY v. AVERILL.

[60 KANSAS, 362.]

MECHANIC'S LIEN. — EVIDENCE THAT THE MATERIALS FURNISHED WERE USED IN THE BUILDING upon which a mechanic's lien is claimed must be given before the lien will attach to the building or its owner can be charged for the materials. Therefore, in an action to recover from the owner of a building the price of materials furnished to the contractor, and to foreclose a mechanic's lien, it is error to refuse to permit the defendant to prove that a portion of the materials had not been used in the construction of the building.

MECHANIC'S LIEN — USE OF THE MATERIALS IN THE BUILDING, EVIDENCE TO SHOW. — The law seldom requires from the material man strict proof that every article purchased has been placed in the building. In ordinary cases it is enough to show that the materials were sold to be used in the building and delivered to the contractor, and to produce some testimony that materials of that character were actually used. Where there is no evidence tending to show that materials so furnished were moved away, or that an unnecessary amount was used in the construction of the building, it will be presumed that that which was furnished was actually used.

APPEAL — NONPREJUDICIAL IRREGULARITY. — Where the plaintiff, in an action against the owner of a building to recover the price of materials furnished therefor, and to foreclose a mechanic's lien thereon testifies,

without objection, that he furnished the lumber for which suit was brought, and that the amount charged was the ordinary and reasonable price, and his account books, though not formally in evidence, have been brought into court and shown, in the cross-examination of the plaintiff, to correspond with the testimony he had previously given, the irregularity of not producing the books at the time the plaintiff was establishing his accounts, is not a prejudicial error which will justify the reversal of a judgment for the plaintiff.

ACTION to recover the price of building materials and to foreclose a mechanic's lien.

H. McGarry, plaintiff in error, for himself.

Ed. H. Madison, for the defendant in error.

JOHNSTON, J. C. W. Averill brought this action to recover a balance due for building material furnished to R. P. Adams for the construction of a building for H. McGarry, and also to foreclose a mechanic's lien which he had filed against the building. He obtained a judgment against Adams for one hundred and fifty-eight dollars and five cents, and a decree foreclosing the mechanic's lien. McGarry contended that there was not as much due as was claimed by Averill, and further, that the material claimed to have been furnished was not actually used in the construction of the building.

Only two errors are assigned. McGarry complains that the court permitted Averill to testify that the account which he had filed for a mechanic's lien was correct, and insists that the books in which the accounts were kept should have been produced. There appears to be little cause for complaint. Averill was examined, and stated, without objection, that he furnished the lumber for which suit was brought, and that the prices charged in the account were the ordinary and reasonable charges. If he actually sold the lumber, and was able to state the amount and the price of the same, there was no occasion for the use of the books. It appears, however, that a few of the sales had been made by a salesman in his employment, and that he had to rely upon the books to some extent. It would have been a more orderly and correct practice to have produced the books in establishing his account. The books, however, were brought into court, and used by the plaintiff in error in his cross-examination, and they corresponded exactly with the proof which had been made. Although not formally introduced in evidence, they were in the hands of the adverse party, and sufficiently before the court to enable it to reach a correct conclusion. It does not

appear that the plaintiff in error was prejudiced by the method of proof, or that there was any substantial error in this ruling of the court.

The second complaint is more serious. . McGarry offered to prove that a portion of the lumber which had been delivered on the lot where the building was erected, and for which suit was brought, was taken away, and not used in the construction of the building. This offer was refused by the court. From other testimony, it appears that some of the lumber delivered was not satisfactory, and was taken away and replaced with other and suitable material. It is possible that if the question had been allowed, it would have been shown that if any lumber delivered there was taken away, that other lumber was substituted for it. Plaintiff in error, however, should have been permitted to produce the proof which he offered. It is not enough that the material was sold to the contractor with the design that it should be used in the construction of the building, but it must in fact be used in the building before a lien will attach or the owner can be charged for the material furnished. It was held in *Hill v. Bowers*, 45 Kan. 592, that "to entitle a person to a lien upon land for material furnished for fencing, it must appear not only that such material was purchased to be used for that purpose, but it must also appear that the same was in fact so used as to become a part of the realty."

It is argued that if the material man must show that every article purchased is placed in the building, the law will afford little protection to him. As will appear from *Rice v. Hodge*, 26 Kan. 164, strict proof in this respect is seldom required. In ordinary cases, it is enough to show that the materials were sold to be used in the building, and delivered to the builder, and there is some testimony showing that material of that character was actually used. In the absence of any proof or circumstance tending to show that material so furnished was moved or taken away, or that an unnecessary amount was used in the construction of the building, it will be presumed that that furnished was actually used. Here, however, there was a direct offer to prove that the material furnished was not used, and the exclusion of this testimony requires a new trial. For this purpose, the judgment will be reversed, and the cause remanded to the district court.

MECHANIC'S LIEN — LIEN OF MATERIAL MEN — TO WHAT ATTACHES. — A mechanic's lien is maintainable only for the material to be used in a particular building: *Whittier v. Puget Sound etc. Banking Co.*, 4 Wash. 666; 31 Am. St. Rep. 944, and note; *Bevan v. Thackara*, 143 Pa. St. 182; 24 Am. St. Rep. 529, and note. A lien for materials furnished to erect a building attaches only where the material furnished has actually been used in the building: *Hunter v. Blanchard*, 18 Ill. 318; 68 Am. Dec. 547, and note; *O'Keefe v. Perce*, 30 Conn. 461; 79 Am. Dec. 263, and extended note; the contrary doctrine is maintained in *Neilson v. Iowa etc. R. R. Co.*, 51 Iowa, 184; 33 Am. Rep. 124; *Odd Fellows' Hall v. Masser*, 24 Pa. St. 507; 64 Am. Dec. 675, and extended note. A mechanic's lien is not created by the purchase of materials on an open general account without reference to putting them into a particular building: *Hill v. Bishop*, 25 Ill. 349; 79 Am. Dec. 333, and note.

PARKINSON SUGAR CO. v. RILEY.

[50 KANSAS, 401.]

MASTER AND SERVANT. — ASSUMPTION OF RISK. — Although an employee, when he enters the service of a master, assumes all ordinary hazards incident to such service, and also other perils of which he has knowledge, yet the master undertakes the duty toward the employee of exercising reasonable care and diligence to provide the employee with a reasonably safe place in which to work, and where the service required of the employee is of a peculiarly dangerous character, undertakes the further duty of making reasonable provision to protect him from dangers to which he is exposed while in the discharge of his duty. Hence when the petition, in an action to recover for personal injuries, alleges that the defendant company was guilty of gross negligence in the construction and maintenance of a cistern which received the waste boiling water from the boilers of a sugar factory, and that the injured person who was an employee in the factory, while engaged in his duties, and without any fault or negligence of his own, and without any knowledge of the cistern, fell into the same and was scalded and burnt, and evidence has been introduced in support of these allegations, it is proper for the trial court to submit to the jury, whether the defendant company was guilty of negligence in permitting the cistern to stand uncovered near one of the doors of the factory; whether the injured person had any knowledge that the cistern was uncovered at the time the injury was received, or could by the exercise of ordinary care have known of its existence; and whether, when he fell therein, he was in the exercise of ordinary care and diligence on his part.

MASTER AND SERVANT — SERVANT, WHEN DEEMED TO BE IN THE LINE OF HIS EMPLOYMENT. — When an employee of a sugar company, who was working on the outside of the factory at the early hour of 4 A. M. asked and received permission from the foreman to go inside the building for the purpose of warming himself, and while attempting to enter the building, fell into an uncovered cistern containing the waste boiling water of the factory and was burned and scalded, the jury is justified in finding that at the time of his injury, he was in the line of his duty to his employer. Such evidence would not sustain a ruling that the

injured person, when he left his place of work for the purpose of entering the building, was "pursuing his own comfort and pleasure, and had, at most, only the part of a licensee to go to that portion of the premises near the cistern, and that he, as a licensee only, took the risks of accident resulting from the use of the premises in which they were."

NEGLIGENCE — DAMAGES — INCONSISTENCY BETWEEN SPECIAL FINDINGS AND VERDICT. — When a trial court in an action brought by the father and next friend of a minor to recover for personal injuries received by the minor, charges the jury that if they find for the plaintiff, there can be no recovery for loss of time, as the injured person is a minor, nor for his board, care, nursing, or medical expenses or attendance, and the jury, while specially finding that they allow nothing for loss of time, medical attendance, expenses for nursing and sickness, physical pain, mental suffering, permanent injury or exemplary damages, also render a verdict for "one thousand dollars as damages for injuries received," the verdict is inconsistent with the instructions and the special findings, and cannot be sustained.

TRIAL. — **SPECIAL QUESTIONS SHOULD NOT BE SUBMITTED TO THE JURY** when there is no evidence to warrant them, or when they relate to points not in dispute, or to elements of damages which are wholly withdrawn from the jury by the charge.

ACTION by a minor employee, through his father as his next friend, to recover damages for personal injuries.

Bawden and Simons, for the plaintiff in error.

A. A. Harris and Henry E. Harris, for the defendant in error.

HORTON, C. J. The Parkinson Sugar Company is and has been for several years last past a corporation organized and engaged in the manufacture of sugar and syrup from sorghum cane at its factory near the city of Fort Scott, in this state. On the south side of its factory building, and attached thereto, the company has a trough, or carrier, through which runs an endless chain, used to convey the stalks of sorghum cane into the building, to be subjected to the process of manufacture. This carrier extends south from the building, and is about one hundred and fifty feet in length. As the sorghum cane is hauled in from the farm and delivered to the sugar company, it is thrown off in a long pile, parallel with, on the west side of and a few feet from, this carrier. Immediately adjoining the foundation wall under the south side of the building, and about four feet west of the door leading into the building, there is a small cistern about three feet in diameter and four and half feet in depth, constructed and used by the company to receive, and into which is discharged, steam and waste boiling water from the boilers and engines in

the factory. On the tenth day of October, 1888, Jesse William Riley, then between seventeen and eighteen years of age, became an employee of the sugar company, and from that time until the early morning of the 20th of the same month continued to work for the company, principally in carrying the stalks of cane from the long pile and placing them in the carrier. While at work for the company on the outside of its factory, about four o'clock in the morning of October 20th, becoming very cold, he asked permission of Wagner, the foreman of the work in which Riley was engaged, to go into the factory for the purpose of warming himself. Wagner gave the desired permission, and, while attempting to go into the door on the south side of the building, he fell into the uncovered cistern containing the waste boiling water, and was burned and scalded. Subsequently, Jesse William Riley, by his father and next friend, William Riley, commenced this action in the court below, alleging in his petition substantially that the sugar company was guilty of gross negligence in the construction and maintaining of the cistern, and that young Riley, while engaged in its employment, and without any fault or negligence of his own, and without any knowledge of the cistern, fell into the same. Judgment was prayed for on account of the injuries received thereby in the sum of ten thousand dollars. The jury returned a verdict in favor of the plaintiff for one thousand dollars, and subsequently judgment was rendered thereon, together with costs. Material errors are alleged, and the more important of them we will refer to.

The jury specially found that young Riley, "at the time of his injury, was engaged in the line of his duty to his employer." On the part of the sugar company, it is contended that the finding of the jury is contrary to the evidence, because "when Riley left his place of work for the purpose of entering the building, he was pursuing his own comfort and pleasure, and had, at most, only the part of a licensee to go to that portion of the premises near the cistern, and that he, as a licensee only, took the risks of accident resulting from the use of the premises in the condition in which they were." We think the evidence fully sustains the finding of the jury in this matter, because he was permitted by the foreman of the work to go into the factory for the purpose of warming himself. It was about four o'clock in the morning. Young Riley was cold. He was as much in line of his employment

when going to warm himself as if he were going to the building to take his midnight meal, which he was accustomed to do; or if he had gone upon a call of nature to a water-closet in the building: *Ryan v. Fowler*, 24 N. Y. 410; 82 Am. Dec. 315; *Marshall v. Stewart*, 83 Eng. L. & Eq. 1.

It is ruled that when an employee enters the service of a master, he assumes all ordinary hazards incident to such service, and also other perils of which he has knowledge. But between the master and the employee, the master assumes the duty toward the employee of exercising reasonable care and diligence to provide the employee with a reasonably safe place at which to work; and where the service required of an employee is of a peculiarly dangerous character, it is the duty of the master to make reasonable provision to protect him from dangers to which he is exposed while engaged in the discharge of his duty: *Atchison etc. R. R. Co. v. Holt*, 29 Kan. 149; *Atchison etc. R. R. Co. v. Moore*, 31 Kan. 197; *Hannibal etc. R. R. Co. v. Fox*, 31 Kan. 586; *Atchison etc. R. R. Co. v. Wagner*, 33 Kan. 660. Therefore, upon the plaintiff's petition and the evidence introduced, it was proper for the court below to submit to the jury whether the sugar company was guilty of negligence in permitting a cistern containing hot water to be uncovered so near the door on the south side of the building; whether young Riley had any knowledge that the cistern was uncovered at the time of the injury, or could, by the exercise of ordinary care, have known of its existence; and whether, when he fell therein, he was in the exercise of ordinary care and diligence on his part.

The serious matter, however, which confronts us in this case is the special findings of the jury. The trial court charged the jury that if they found for the plaintiff below, there could not be any recovery for loss of time, as young Riley was a minor, nor for his board, care, nursing, or medical expenses or attendance. The jury specially found that they allowed nothing for loss of time, medical attendance, expenses for nursing and sickness, physical pain, mental suffering, permanent injury, or exemplary damages; yet they specially found "one thousand dollars as damages for injuries received." When the special finding of facts is inconsistent with the general verdict, the former controls the latter: Civil Code, sec. 287; *Atchison etc. R. R. Co. v. Maher*, 23 Kan. 163. If any reasonable basis or ground existed upon which the jury could give one thousand dollars damages for injuries re-

ceived, in view of the other special findings, it might be said that the special findings were not inconsistent with the general verdict; but the only grounds upon which damages are allowed for personal injuries, in the absence of permanent injury and exemplary damages, are for loss of time and pain or suffering. All of these are eliminated from the general verdict by the special findings of the jury. It is suggested that the damages were allowed for temporary injury or disability; but temporary injury or disability is no basis for damages unless there is loss of time, or pain, or suffering. The court ruled loss of time out of the case. The jury found nothing for either physical pain or mental suffering. If it be said that the one thousand dollars damages for injuries received included probable pain and suffering after the trial,—in the future, but not in the past,—this is a strained and unreasonable construction.

Young Riley was injured on the 20th of October, 1888; both of his legs were badly scalded four or five inches above his knees, and his arm up to the shoulder; he was in bed most of the time until April, 1889; he was attended by two physicians, and one of them continued to visit him to the last part of March. If the jury allowed nothing for pain and suffering from the 20th of October, 1888, to the 25th of October, 1889, the date of the commencement of the trial, it cannot be presumed that they intended to allow one thousand dollars for the injuries after the return of the verdict. Injury resulting from the acts or omissions of others may consist in some cases of the actual pecuniary loss directly sustained, of the indirect pecuniary loss sustained in consequence of the primary loss; of the physical and mental suffering produced by the act or omission in question; the value of the time consumed in establishing the contested right by process of law, if suit is necessary; the actual expenses incurred, and the sense of wrong or insult in the sufferer's breast, resulting from fraud, malice, oppression, or willful wrong: 1 Sedgwick on Damages, 8th ed., sec. 37. Under the charge of the court and the special findings of the jury, there was nothing whereon to base the one thousand dollars allowed by the general verdict. Physical pain is always regarded as a subject for compensation; this compensation being its pecuniary equivalent as measured by the jury. Mental suffering with bodily suffering is also a subject for compensation. If young Riley was entitled to any recovery, he should have had compensation for his physical

pain and mental suffering during the many months he was confined at his home by his severe injuries.

Counsel for Riley criticize the special questions submitted by the trial court to the jury, and state that they objected to them. No motion for a new trial was made on the part of Riley, and no cross petition is filed in this court; therefore, we cannot examine at any length for any good purpose, the criticisms upon the questions submitted. This much, however, may be properly said: The trial court should have refused to submit questions to the jury which had no evidence to warrant them, or which related to points not in dispute, or upon elements of damages wholly withdrawn from the jury by the charge. Therefore, the questions about loss of time, expenses for medical attendance and nursing, ought never to have gone to the jury. These unnecessary questions undoubtedly confused and troubled the jury, when they had been specially charged not to allow any damages implied thereby. Being thus confused and possibly misled, it is not strange that the jury answered inconsistently. The trial court ought to have had the special findings corrected or explained before the jury were discharged. When physical pain is established, such pain and mental suffering are so closely connected that a single finding as to the damages allowed therefor is all that is necessary. This court said, in *Morrow v. Commissioners of Saline Co.*, 21 Kan. 484, that "the main object of special questions is to bring out the various facts separately, in order to enable the court to apply the law accurately, and to guard against any misapplication of the law by the jury." See also *Wyandotte v. Gibson*, 25 Kan. 236; *Foster v. Turner*, 31 Kan. 58; *Fowler v. Hoffman*, 31 Mich. 215; *Davis v. Farmington*, 42 Wis. 425.

The special findings of the jury being in conflict with each other and also inconsistent with the general verdict, no judgment can be entered thereon by this court. The judgment of the court below, however, must be reversed on account of the conflicting special findings and the inconsistency between such findings and the general verdict, and the cause remanded for a new trial.

MASTER AND SERVANT. — THE MASTER'S DUTY TO FURNISH A REASONABLY SAFE PLACE FOR SERVANT TO WORK: See *Wagner v. Jayne Chemical Co.*, 147 Pa. St. 475; 30 Am. St. Rep. 745; *McElligott v. Randolph*, 61 Conn. 157; 29 Am. St. Rep. 181; *Hill v. Northern Pac. R. R. Co.*, 1 N. D. 336; 26 Am. St. Rep. 621; *Johnson v. First Nat. Bank*, 79 Wis. 414; 24 Am. St. Rep. 722,

and note; *Dayhara v. Hannibal etc. R. R. Co.*, 103 Mo. 570; 23 Am. St. Rep. 900, and note with the cases collected; see extended note to *Malone v. Hathaway*, 21 Am. Rep. 579-582.

MASTER AND SERVANT — ASSUMPTION OF RISK. — While a servant assumes the ordinary risks and dangers of the business, yet where the master subjects him to danger such as in good faith he ought to provide against, he is liable for any accident happening therefrom: *Kehler v. Schwenk*, 151 Pa. St. 505; 31 Am. St. Rep. 777, and note; *Wagner v. Jayne Chemical Co.*, 147 Pa. St. 475; 30 Am. St. Rep. 745, and note with cases collected.

TRIAL — INCONSISTENCY BETWEEN SPECIAL FINDING AND VERDICT. — When a special finding is inconsistent with the general verdict the former must control the latter: *Bess v. Chesapeake etc. R. R. Co.*, 35 W. Va. 492; 29 Am. St. Rep. 820; *Louisville etc. R. R. Co. v. Crunk*, 119 Ind. 542; 12 Am. St. Rep. 443.

MASTER AND SERVANT. — A master is not liable to a servant for an injury received by him from the falling in of the roof of a room while he is visiting employees of the same master there, but in which he is not himself employed: *Wright v. Rawson*, 52 Iowa, 329; 35 Am. Rep. 275; but he would be liable to a servant injured by the fall of an insecure privy in the factory in which he was employed: *Ryan v. Fowler*, 24 N. Y. 410; 32 Am. Dec. 815, and note.

MILTONVALE STATE BANK v. KUHNLE.

[50 KANSAS, 420.]

MORTGAGES — RECORD NOTICE — IDEM SONANS. — Since a person may be sufficiently described in a written instrument by prefixing his initials to his surname, and the names "Johnson" and "Johnston," as ordinarily pronounced by the generality of mankind, are *idem sonans*, a mortgage executed by "S. M. Johnson" is sufficient to impart notice of the execution of a mortgage by "Samuel M. Johnston."

MORTGAGES — RIGHTS OF SUBSEQUENT MORTGAGERS. — A subsequent mortgagee with notice of a prior mortgage is not a subsequent mortgagee in good faith.

Pulsifer and Alexander, for the plaintiff in error.

Dawes and Durrin, for the defendant in error.

GREEN, C. This was an action in replevin, brought in the district court of Cloud County by the Miltonvale State Bank against F. Kuhnle, to recover eight cows and four calves of the aggregate value of two hundred dollars. The plaintiff claimed the property under a chattel mortgage made by Samuel M. Johnston to it on the seventh day of September, 1887, to secure the payment of nine hundred and twenty-five dollars, and filed for record the next day in the office of the register of deeds of Ottawa County, where the mortgagor resided and the property was then kept. The mortgage was kept alive by a

renewal affidavit filed in the office of the register of deeds on the twenty-second day of August, 1888. The defendant claimed the same property under mortgages executed by the same mortgagor to him as follows: To secure the payment of one hundred and seventy-one dollars, executed on the seventeenth day of April, 1886, which was properly filed for record three days later, but was never kept alive by a renewal affidavit. On the fifteenth day of April, 1887, S. M. Johnson executed a chattel mortgage to the defendant to secure the payment of one hundred dollars, which was duly filed for record on the eighteenth day of April, 1887, but was never renewed. On the seventeenth day of March, 1888, Samuel M. Johnston executed a chattel mortgage to the defendant to secure the payment of one hundred and forty-seven dollars and seventy cents, which was filed for record on the twenty-seventh of the same month, but was never kept alive. Upon the above facts, the court found that the defendant was entitled to a return of five of the cows, or one hundred and one dollars, their value. The claim is made by the plaintiff in error that the mortgage of April 15, 1887, is wholly insufficient to furnish it with record notice of the existence of such mortgage, for the reason that the mortgagor's name under whom both parties claimed was Samuel M. Johnston, while this mortgage was given by S. M. Johnson. The defendant in error contends that he held the cows under the mortgage dated April 15, 1887; that the plaintiff in error took a mortgage upon the same cattle September 7, 1887, while his mortgage was yet alive and in force. It being alive and valid at the time the plaintiff in error took its mortgage, as to the defendant in error's mortgage so taken it could never die. The contention of the plaintiff in error that a mortgage executed by S. M. Johnson is not sufficient to impart notice of the execution of a mortgage by Samuel M. Johnston is not well taken. This court has said that a written instrument should not be regarded as a nullity because the Christian name of any person is not mentioned therein and has not been written in full, but only the initial letters have been used: *Ferguson v. Smith*, 10 Kan. 397.

It is insisted that Johnston and Johnson are not even *idem sonans*. The rule has been stated: "That absolute accuracy in spelling names is not required in documents or proceedings, either civil or criminal; that if the name, as spelled in the document, though different from the correct spelling thereof,

conveys to the ear, when pronounced according to commonly accepted methods, a sound practically identical with the sound of the correct name as commonly pronounced, the name as thus given is a sufficient designation of the individual referred to, and no advantage can be taken of the clerical error": 16 Am. & Eng. Ency. of Law, 122.

In the pronunciation of proper names greater latitude is indulged in than in any other class of words: *Rooks v. State*, 83 Ala. 79. Courts will not enforce the exact rule of lexicographers in the spelling and pronunciation of words. Indeed, it is difficult to determine when names are of the same sound, and it would take a practiced ear to detect the difference in the sound of Johnston and Johnson as ordinarily pronounced by the generality of mankind. As previously held by this court in the case of *Howard v. First Nat. Bank*, 44 Kan. 549, and *Farmers' etc. Bank v. Bank of Glen Elder*, 46 Kan. 876, a subsequent mortgage with notice of a prior mortgage is not a subsequent mortgage in good faith, under paragraph 3905 of the General Statutes of 1889. Upon the authority of the above cases the trial court was correct in the judgment rendered.

The last point urged is, that there was no evidence before the court to sustain the findings in favor of the defendant for the five cows under the mortgage of April 15, 1887. It seemed to have been conceded that the five cows adjudged to be the defendant's were in all of the chattel mortgages. The court so found, and we think there is some evidence to support the finding in the record.

It is recommended that the judgment of the district court be affirmed.

By the COURT. It is so ordered.

NAMES—IDEM SONANS.—WHAT ARE: See *State v. White*, 24 S. C. 59, 27 Am. St. Rep. 783, and note with the cases on this subject collected. "Forris" and "Farris" are *idem sonans*: *Lyne v. Sanford*, 82 Tex. 58; 27 Am. St. Rep. 852, and note.

MORTGAGES—SECOND MORTGAGEE, RIGHTS OF.—A junior mortgagee is bound by the record of a senior mortgage: *Ames v. New Jersey etc. Co.*, 12 N. J. Eq. 66; 72 Am. Dec. 385. A subsequent mortgagee loses his equity, if he ever had any where with knowledge of a prior mortgage he pays his money and delays for two years in complaining of the prior mortgage: *Olabough v. Byerly*, 7 Gill, 354; 48 Am. Dec. 575, and note. The record of a second mortgage does not affect a mortgagee under a prior recorded mortgage: *Chesbrough v. Millard*, 1 Johns. Ch. 409; 7 Am. Dec. 494; nor will actual knowledge of a subsequent mortgage affect a prior mortgagee: *McDaniels v. Colton*, 16 Vt. 300; 42 Am. Dec. 512.

BURKE v. FINLEY.

[50 KANSAS, 424.]

EXEMPTION—WAIVER OF.—The exemption of wages provided in section 4589, of the general statutes of Kansas, is created for the benefit of the debtor's family, and cannot be waived by him. Hence, although the lease, under which a debtor occupies his dwelling, contains a waiver of the benefit of the exemption laws of the state, money which is due to him for personal services rendered during the period covered by the statute and which is needed for the support of his family, is not subject to garnishment at the suit of the landlord.

J. Jay Buck and W. A. Randolph, for the plaintiff in error.

Cunningham and McCarty, for the defendant in error.

STRANG, C. On September 15, 1888, the plaintiff, W. D. Burke, leased certain premises of the defendant, J. K. Finley, situate in Emporia, Lyon County, Kansas. Said lease contained a waiver of the benefit of the exemption laws of Kansas. Afterward, rent became due on said lease, and suit was brought against the plaintiff therefor, and on the 7th of October, 1889, a judgment was had against him for quite a large sum of money. November 23d, thereafter, execution was issued thereon, and garnishment proceedings were run against the Atchison, Topeka and Santa Fe Railroad Company. Said company answered that it was indebted to said Burke in the sum of fifty-four dollars. Thereafter, on December 30, 1889, the defendant Burke filed in said cause his motion to discharge said garnishment proceedings, and supported the same by an affidavit showing that he was a citizen of Kansas, and had been for a year or more; that he had a family consisting of a wife and three small children, who were wholly dependent upon his labor and earnings for support; and that the money garnished in the hands of said company was wholly due for personal services rendered by him to said company between September 26, 1889, and October 27, 1889; and that all of the said sum was needed for the support of his said family. There was no evidence to rebut this showing in any way, and the only question decided by the court below was, whether the defendant Burke had waived the exemption guaranteed to him and his family under the General Statutes of 1889, paragraph 4589, by reason of the exemption clause in said lease. The court below refused to discharge said garnishment proceedings, thereby holding that Burke had waived the exemption guaranteed by said para-

graph 4539 of the General Statutes of 1889. The only question for this court to decide is, whether the trial court erred in refusing to discharge said garnishment proceedings.

We do not think the waiver of the exemption laws of Kansas, contained in the lease upon which the judgment against Burke was obtained, operates as a waiver of the exemption of wages provided in the General Statutes of 1889, paragraph 4589. The waiver contained in the lease aforesaid must be limited to the property rights of the debtor under the general exemption laws of the state. In creating the exemption under paragraph 4589, the legislature did not intend to create a new and additional personal privilege in the debtor, that he might claim or waive at his option, but to create an exemption in the interest and for the benefit of the family of the debtor. This exemption is not given to every debtor. It is limited to those debtors who have families dependent upon their earnings for support. Being created for the benefit of the debtor's family, he cannot waive it. It follows, therefore, that this case should be reversed, and sent back for further proceedings.

By the COURT. It is so ordered.

WAIVER OF EXEMPTION — LEGALITY OF. — An executory agreement by a debtor to waive all benefit under the exemption laws is against public policy and void: *Moxley v. Ragan*, 10 Bush, 156; 19 Am. Rep. 61; *Moran v. Clark*, 30 W. Va. 358; 8 Am. St. Rep. 66, and note; *Kneettle v. Newcomb*, 22 N. Y. 249; 78 Am. Dec. 186, and note; *Carter v. Carter*, 20 Fla. 558; 51 Am. Rep. 618; *Curtis v. O'Brien*, 20 Iowa, 376; 89 Am. Dec. 543, and notes; *Recht v. Kelly*, 82 Ill. 147; 25 Am. Rep. 301; *Butler v. Shiver*, 79 Ga. 172; *Cochran v. Harvey*, 88 Ga. 352. *Contra*: See *Brown v. Leitch*, 60 Ala. 313; 31 Am. Rep. 42, and note. An agreement by a laborer to waive the provisions of the statute exempting his wages from attachment in a note signed by him is void: *Firmstone v. Mack*, 49 Pa. St. 387; 88 Am. Dec. 507, and note. The constitutional exemption of wages from garnishment may not be waived as to all future wages: *Green v. Watson*, 75 Ga. 471; 58 Am. Rep. 479, and note. See also extended note to *Bowman v. Smiley*, 72 Am. Dec. 741.

BACON v. LESLIE.

[50 KANSAS, 494.]

SPECIFIC PERFORMANCE—SUFFICIENCY OF DESCRIPTION. — In an action for the specific performance of a contract for the sale of land, it is not essential that the description of the land in the writing which evidences the contract should be given with such particularity as to make a resort to extrinsic evidence unnecessary. If the designation of the land is so definite that the purchaser knows exactly what he is buying, and the seller what he is selling, and the land is so described that the court can, with the aid of extrinsic evidence, apply the description to the exact property intended to be sold, it is enough.

SPECIFIC PERFORMANCE—EXTRINSIC EVIDENCE TO AID DESCRIPTION IN WRITTEN CONTRACT. — A description of property in a written contract for the exchange of land as “ $\frac{1}{2}$ of section 7-23-7, and all of section 18-23-7, in Sycamore township, Butler County, Kansas,” is not so uncertain and indefinite that a decree for specific performance of the contract will be refused if the petition for such specific performance alleges, and it is proven upon the trial, that, “at the time of the execution of the agreement, the defendant was the owner of section eighteen and the south half of section seven, all in township twenty-three south, of range seven east, in Butler County, Kansas, and was not the owner of any other real estate in said section seven.”

SPECIFIC PERFORMANCE—WHAT SHOULD BE SHOWN IN THE PETITION. Where a contract describing land to be conveyed is indefinite and uncertain, and therefore to be reformed on account of the mutual mistakes or omissions of the parties, or where it can be made sufficiently definite and certain by extrinsic evidence, the petition should show all the facts, and what is desired before a specific performance is decreed; and all the matters in controversy, both as to the reformation of the contract, if that be necessary, or the identification of the property by extrinsic evidence, should be settled and disposed of in the same action.

SPECIFIC PERFORMANCE—DEFENSES—CONTEMPORANEOUS PAROL AGREEMENT. — A parol contract made contemporaneously with a written contract for the exchange of land, as a part thereof or in connection therewith, cannot be introduced as a defense to an action for the specific performance of the written contract, if it alters, varies, or contradicts the latter.

SPECIFIC PERFORMANCE—DEFENSES—EVIDENCE INSUFFICIENT TO SHOW FRAUD. — Where the testimony shows that the defendant, in an action for specific performance of a contract for the exchange of land, has resided for over twenty years within a short distance of the land which is to be conveyed to him, and that he has seen and had opportunity to examine the property before he signed the contract, it cannot be said that any fraud, either to obtain his signature or otherwise, has been established.

SPECIFIC PERFORMANCE—INSUFFICIENCY OF DESCRIPTION—PRACTICE ON APPEAL. — Where a part of the description in a written contract for the exchange of land is too indefinite and uncertain to be enforced in the absence of extrinsic evidence to identify the land to which the description applies, and the trial court, in an action for specific performance of the contract, has improperly refused to permit the plaintiff to intro-

duce such extrinsic evidence, but the error has not been so set out on the record that it can be corrected on appeal, the appellate court will not on that account disregard the remainder of the description, nor treat the contract as a nullity, but, if the plaintiff is willing to take a conveyance of that portion of the land of which the description is sufficiently certain as an adequate performance of the contract, a decree of the trial court in his favor will be modified so as to give him the option of accepting that portion within a given period or of having the decree reversed, and the cause remanded for a new trial.

ACTION by Leslie against Bacon for specific performance of a contract for the exchange of land, under which Leslie was to convey to Bacon the following described property: "Lots thirty-three and fifty-four, Bernard Place, Kansas City, Mo., with the buildings and other improvements thereon, subject to an encumbrance of five thousand three hundred and fifty dollars on each lot," and Bacon was to convey to Leslie "the one half of section 7-23-7, and all of section 18-23-7, all being in Sycamore township, in Butler County, Kansas." The plaintiff alleged that he examined the defendant's land, found it satisfactory, notified him thereof, and deposited with one Burgin an abstract of the property which he himself was to convey, showing a perfect title in himself, and that it was free from all encumbrances except those specified in the contract. The plaintiff further alleged that at the time of the execution of the agreement, Bacon was the owner of section 18 and the south half of section 7, all in township 23 south, of range 7 east, in Butler County, Kansas, and was not the owner of any other real estate in said section 7, and that the land last above described was the land intended to be conveyed by said contract, and was therein described as "one half of section 7-23-7, and all of section 18-23-7, all being in Sycamore township, Butler County, Kansas." The defendant filed a general demurrer, which was overruled, and then answered: 1. With a general denial; 2. With an allegation of a contemporaneous parol agreement; 3. With an averment that certain persons had conspired together to cheat and defraud him in making the written contract. The trial court made a general finding in favor of the plaintiff, and directed the defendant to execute a deed to the plaintiff for "one half of section 7, in township 23 south, of range 7 east, and all of section 18, township 23 south, of range 7 east, all in Sycamore township, Butler County, Kansas." The defendant excepted to the findings, rulings, and judgment of the trial court, and appealed.

D. S. Twitchell and Redden and Schumacher, for the plaintiff in error.

A. L. L. Hamilton, J. K. Cubbison, and Harkless and Marley, for the defendant in error.

HORTON, C. J. It is contended on the part of the defendant below that the trial court committed five material errors. They are alleged as follows: 1. The overruling of the demurrer to the petition; 2. Overruling the objection of the defendant to the introduction of any testimony under the petition; 3. Overruling the demurrer of the defendant to the evidence of the plaintiff; 4. Excluding material testimony offered by the defendant; 5. Striking out material testimony of the defendant after it had been received.

We will discuss the first, second, and third objections together, because the principal question presented thereby is, "that the description of the land is so indefinite the court could not declare a specific performance." The property described in the contract is as follows: " $\frac{1}{2}$ of section 7-23-7, and all of section 18-23-7; the above property to be free and clear of all encumbrances, and being in Sycamore township, Butler County, Kansas." The decree for the specific performance described the property in the terms of the contract, and the trial court did not attempt in its decree and judgment to find or adjudge what " $\frac{1}{2}$ of section 7-23-7" was referred to in the contract, or to be included in the deed required by the decree of specific performance. The trial court very properly overruled the demurrer to the petition, and the objection of the defendant to the introduction of testimony, upon the ground that the description in the contract, "of $\frac{1}{2}$ of section 7" was too uncertain and indefinite to decree a specific performance, because the petition alleged, among other things, "that at the time of the execution of the agreement the defendant was the owner of section 18 and the south half of section 7, all in township 23 south, of range 7 east, in Butler County, Kansas, and that the defendant was then the owner of no other real estate in said section 7 than the last above described; and that said real estate last above described was the land intended to be conveyed as therein set forth, and described as ' $\frac{1}{2}$ of section 7-23-7, and all of section 18-23-7,' and being in Sycamore township, Butler County, Kansas."

It was said in *Hollis v. Burgess*, 37 Kan. 494: "It is not

essential, however, that the description should be given with such particularity as to make a resort to extrinsic evidence unnecessary. If the designation is so definite that the purchaser knows exactly what he is buying, and the seller knows what he is selling, and the land is so described that the court can, with the aid of extrinsic evidence, apply the description to the exact property intended to be sold, it is enough": Fry on Specific Performance, 3d ed., sec. 325; Pomeroy on Contracts, sec. 90; *Fowler v. Redican*, 52 Ill. 405; *Bowen v. Prout*, 52 Ill. 354.

In *Hurley v. Brown*, 98 Mass. 545, 96 Am. Dec. 671, the written contract described the property as "a house and lot of land situated on Amity Street." There being several such, parol evidence was admitted to show that there was one only which the defendant had any right to convey, and that the parties had been in treaty for the sale and purchase of it. The court held that the subject-matter of the contract might thus be identified, and when so ascertained, the writing might be construed to apply to it, and was thus made sufficiently definite and certain for specific enforcement in equity.

In *Mead v. Parker*, 115 Mass. 413, 15 Am. Rep. 110, the description was "a house on Church Street." The court said: "When all the circumstances of possession, ownership, situation of the parties, and of their relation to each other and to the property as they were when the negotiations took place and the writing was made are disclosed, if the meaning and application of the writing, read in the light of those circumstances, are certain and plain, the parties will be bound by it as a sufficient written contract or memorandum of their agreement. That parol evidence is competent to furnish these means of interpreting and applying written agreements, is settled by the uniform current of authorities."

In *Waring v. Ayres*, 40 N. Y. 357, the description was "two lots owned by me in One Hundred and Sixteenth Street, New York, between Eighth and Ninth avenues, said lots being twenty-five feet front by about seventy-five feet deep. E. Ayres." The court said: "Now if no other lots will answer that description, there is no want of certainty in respect to the subject, i. e., the property to be conveyed. The referee finds that no other lots than those named in the judgment will answer that description, and that those named in the judgment do answer the description precisely. I know of no rule of law or equity which requires the employment of one

set of terms or form of words to describe real estate proposed to be conveyed. An agreement to sell and convey the farm in the town of Bath, belonging to me, is definite and certain the moment it appears which farm in the town of Bath does in part belong to me": *Tetherow v. Anderson*, 63 Mo. 96.

While the allegations in the petition were sufficient, if proven upon the trial, for a specific performance, we do not think there was evidence received by the court identifying half of section 7-23-7. The trial court, for some reason not apparent, improperly refused to permit the plaintiff below to show that at the time of the execution of the contract Bacon owned the south half of section 7-23-7 east, in Sycamore township, Butler County, and that he was the owner of no other real estate in said section 7 than the south half of said section. If this evidence had been received, the contract as to the half of section 7 would have been sufficiently identified for specific performance. No motion was made upon the part of the plaintiff below for a new trial, and no cross petition in error is filed in this court. We therefore cannot correct any rulings of the trial court not complained of and not here upon proper proceedings for reversal. As we are neither informed from the contract or evidence received what half of section 7 was meant, whether the north half, the south half, the east half, or the west half, the description in the record is too indefinite and uncertain.

It is urged by counsel on the part of plaintiff below that if the description of the half of section 7 is too defective, it may be corrected by another or further action for that purpose, and therefore that the judgment should stand. Some cases are cited apparently supporting this view: *Bean v. Valle*, 2 Mo. 126; *Hooper v. Laney*, 39 Ala. 338. Courts, as a rule, abhor a multiplicity of suits between the same parties growing out of the same transactions. We think the better rule to be that where a contract describing land to be conveyed is indefinite and uncertain, and therefore is to be reformed on account of the mutual mistakes or omissions of the parties, or where it can be made sufficiently definite and certain by extrinsic evidence, the petition should show all the facts and what is desired before a specific performance is decreed; and all the matters in controversy, both as to the reformation of the contract, if one is necessary, or the identification of the property by extrinsic evidence, should be settled and disposed of in the same action. Upon the trial, it was urged in the

presentation of evidence on the part of the plaintiff below that the description in the written contract of the half of section 7 should have been the south half of said section 7; that Bacon gave to the party writing the contract the description as the "south half of section 7," but by inadvertence or mistake of the scrivener it was written "half of section 7." If this be true, plaintiff below might have amended his petition so as to have had the contract reformed, with the proper description as given by the parties to the scrivener.

The claim made upon the part of the defendant below, that if the description of "one half of section 7" is too indefinite or uncertain in the absence of extrinsic evidence to be enforced, therefore all the descriptions in the contract must be disregarded and the contract itself treated as a nullity, is not reasonable or equitable. If plaintiff below is willing to accept, in payment of his property described in the contract, "all of section 18-23-7, in Sycamore township, Butler County, in this state," the defendant below cannot complain because of the indefiniteness or uncertainty of "one half of section 7," or of the failure of the plaintiff below to obtain a deed for all the property he brought his action to recover. "It is a rule of construction that where there is a doubt as to the construction of a deed, it shall be taken most favorably for the grantee. Whence, if there are two descriptions in a deed of the land conveyed, and they do not coincide, the grantee is at liberty to elect that which is most favorable to him": *Sharp v. Thompson*, 100 Ill. 447; 39 Am. Rep. 61; *Melvin v. Proprietors of Locks*, 5 Met. 27; 38 Am. Dec. 384; 3 Washburn on Real Property, 628, 629; *Esty v. Baker*, 50 Me. 331; 79 Am. Dec. 616; *Waterman's Specific Performance*, sec. 396.

The case of *Becker v. Mason*, 30 Kan. 697, referred to, is not applicable. In that case, the contract was not signed by the party to be charged. In such a case, the contract must be proved, if proved at all, by some written note or memorandum of the contract signed by the party to be charged. The infirmity in that case vitiated and destroyed the whole of the contract. In this case, the memorandum of the contract is signed by the party to be charged, and the description of a portion of the land therein is definite and certain; a part is indefinite and uncertain, in the absence of extrinsic evidence, but the contract may be held valid as to that which is properly and sufficiently described.

Complaint is also made that the plaintiff below failed in

his evidence; because of some alleged defects in his abstract of title. An abstract of title was furnished within the time required by the contract, and a warranty deed was also executed and delivered according to the contract. Defendant below refused to make any conveyance by warranty deed or otherwise; made no objections to the abstract or called attention to any defects therein. It does not appear from the record that the defects now alleged in the abstract or deed were called to the attention of the trial court. On the other hand, it does appear that the principal defenses in the trial were the indefinite description of the property, a contemporaneous parol agreement between the parties, and that the signature of the defendant to the contract was obtained by fraud.

We perceive no material error in excluding or striking out testimony. There was no proof of any consideration for any new or parol contract changing the original contract of the parties. If the parol contract was made contemporaneously with the contract, as a part thereof, or in connection therewith, it could not be proved, if it altered, varied, or contradicted the written contract: *Schoen v. Sunderland*, 39 Kan. 758. The testimony shows that the defendant below resided in Kansas City, Missouri, where the property he is trading for is situated, and had resided there for over twenty years, and that he lived about three fourths of a mile from the same. It further appears from his testimony that he had seen and had had an opportunity to examine the property before he signed the contract; therefore, we do not think any fraud was established either to obtain his signature to the contract or otherwise: *Waterman's Specific Performance*, sec. 317; *Story's Equity Jurisprudence*, sec. 200, and sub.; *Dyer v Hargrave*, 10 Ves. 505; *Pratt v. Philbrook*, 33 Me. 17; *Hough v. Richardson*, 3 Story, 659; *Langdon v. Green*, 49 Mo. 363.

If the plaintiff below will, within thirty days, file in writing in the district court of Butler County his written consent to a modification of the judgment rendered in this case, so as to omit therefrom "one half of section 7-23-7, in Sycamore township, Butler County, in this state," the judgment will be allowed to stand as thus modified; otherwise the judgment will be reversed, and the cause remanded for a new trial. If plaintiff below accepts the modification of the judgment as suggested, the costs in this court will be divided; if he does not so accept, a reversal will be ordered, with costs.

SPECIFIC PERFORMANCE — SUFFICIENCY OF DESCRIPTION. — EXTRINSIC EVIDENCE is admissible to aid the description of land in a contract of sale, where both parties understood what was being bought and sold: *Proble v. Abrahams*, 88 Cal. 245; 22 Am. St. Rep. 301, and note. A practical location of the boundaries of leased property by the landlord pointing them out, coupled with a subsequent possession of the same with the landlord's consent, is a sufficient location of the property: *Weaver v. Shipley*, 127 Ind. 526. When it appears that a complainant is entitled to a conveyance of land but its quantity and location are uncertain, the court may order a survey: *Hancock v. Hancock*, 1 T. B. Mon. 121; 15 Am. Dec. 92. Specific performance of a contract to convey land will be decreed only when the description of the subject-matter is so certain that it may be known therefrom what the purchaser was contracting for and the vendor selling: *Hamilton v. Harvey*, 121 Ill. 469; 2 Am St. Rep. 118, and note. See note to *Minneapolis etc. Ry Co. v. Cox*, 14 Am. St. Rep. 220.

SPECIFIC PERFORMANCE — CONTRACT VARIED BY PAROL AGREEMENT. — A written contract for the sale of land varied in a material particular by parol will not be enforced in equity: *Heth v. Wooldridge*, 6 Rand. 605; 18 Am. Dec. 751. See also *Minneapolis etc. Ry Co. v. Cox*, 76 Iowa, 306; 14 Am. St. Rep. 216, and note.

STATE v. CALHOUN.

[50 KANSAS, 522.]

THE COMMON LAW HAS EXISTENCE AND FORCE in Kansas in all cases, where it is not inconsistent with the constitution, statutes, institutions of the state, and where, without it, proper remedies for injustice and wrong, and for the redress of grievances would not be furnished.

CRIMINAL LAW — WRIT OF ERROR CORAM NOBIS, WHEN AN APPROPRIATE REMEDY. — One who, after indictment, is constrained by the fear of mob violence to plead guilty in the district court to the charge against him, and is thereupon sentenced to imprisonment and hard labor in the penitentiary, may obtain relief in the same court from such sentence and plea by proceedings in the nature of the common-law writ of error *coram nobis*.

STATUTE OF LIMITATIONS — DISABILITY OF IMPRISONMENT. — One who, from fears of his life or of great personal injury, pleads guilty to a criminal charge, and is thereupon sentenced to imprisonment and hard labor in the penitentiary for a term of years exceeding the time prescribed by the statute of limitations for the commencement of an action or proceeding to obtain relief from the judgment against him, is under such a legal disability as will prevent the statute of limitations from running against him in respect to such action or proceeding, but is not under such a legal disability as will debar him from maintaining an action to restore him to his just rights, provided that some friend will commence and conduct the proceeding for him. Any other construction of the statute would leave a person in such a position entirely without the means of obtaining relief from the consequences of his sentence, until he had served in prison the full time for which he was sentenced, and the commencement of a proceeding would then be of no benefit to him.

ATTORNEY AND CLIENT — CONFIDENTIAL COMMUNICATIONS. — Where a prisoner who has begun proceedings in the nature of a writ *coram nobis* to obtain relief from his sentence, makes a deposition in which he states that the relation of attorney and client had never existed between him and one K, and K, on the other hand, subsequently testifies at the trial that at the time he held with the prisoner a certain conversation which the state is seeking to introduce in evidence, he was employed as the attorney of the prisoner, and that the conversation was held between them in the relation of attorney and client, the exclusion of evidence of that conversation by the trial court, on the ground that it consisted of confidential communications, cannot, on appeal, be pronounced erroneous.

ERROR CORAM NOBIS, GUILT OF PRISONER MAY NOT BE CONSIDERED IN. —

Where a person who has been sentenced to imprisonment on a plea of guilty, which he was compelled to make by the fear of mob violence, is seeking relief by proceedings in the nature of a writ of error *coram nobis*, the question of his guilt or innocence cannot be considered by the jury. A mob has no right, by any means, to shift the burden of proof from the state to the accused, or to relieve the state from proving the guilt of the accused beyond a reasonable doubt. The prisoner, in such a proceeding, has the right to be placed in the same condition as he was before he entered his plea of guilty, and to insist that the question of his guilt should be investigated under the ordinary conditions of a criminal trial, in which he can avail himself of all the rights guaranteed to accused persons by the constitution.

ERROR CORAM NOBIS, EVIDENCE ADMISSIBLE IN PROCEEDINGS ON. — When a prisoner is seeking to obtain relief from his sentence by proceedings in the nature of a writ of error *coram nobis*, on the ground that he was constrained by fears of mob violence to plead guilty to the charges against him, it is not improper for the trial court to permit the accused to show threats of mob violence made both before and after the plea of guilty was entered, as well as threats not communicated to him before his plea was entered. Such evidence is all competent as tending to show that there was a real danger of mob violence, and that the fears of the accused were well founded, and it is therefore rightly submitted to the jury.

W. H. Carpenter, for the plaintiff in error.

Frank Doster, for the defendant in error.

VALENTINE, J. At the February term of the district court of Marion County, in 1885, the grand jury found two indictments against Robert Calhoun for defiling females under the age of eighteen years, committed to his care and protection, by carnally knowing them. The fact of such indictments having been found became known in the community. The public mind became greatly excited and hostile to the accused. Threats of lynching him were freely made, and preparations to carry out the same were apparently going on. Knowledge of these threats and preparations was communicated to the accused, who was then in jail, and the same produced in his

mind such a state of fear that to appease the passions of the community, and secure himself from bodily violence, he pleaded guilty to the charges contained in such indictments, and was sentenced to the maximum limit of punishment—twenty-one years' confinement in the penitentiary at hard labor, in each case. In March, 1892, in the district court of Marion County, he brought proceedings in the nature of those known to the common law as writs of error *coram nobis*, to revoke the aforesaid sentences, and to set aside the pleas of guilty, upon the ground that such pleas had been extorted from him by duress and threats and appearances of impending and imminent mob violence, operating upon his fears, whereby he had not been allowed his constitutional rights to plead his innocence of the charges alleged against him in said indictments, to defend against the same in person and by counsel, to meet the witnesses against him face to face, and to have a public trial by an impartial jury. A trial was had in the error *coram nobis* proceeding at the September term, 1892, before the court and a jury, and the jury returned a general verdict in favor of the plaintiff, Calhoun, and also returned a special verdict, which, omitting title and signature, reads as follows:—

“We, the jury impaneled and sworn, upon our oaths do find that in the cases numbered 1546 and 1547, in the district court of Marion County, Kansas, at its February term for the year 1885, wherein the state of Kansas was plaintiff and Robert Calhoun was defendant, being indictments for the offenses of carnally knowing females under the age of eighteen years, confided to his care and protection, found and returned by the grand jury of said county, at said term, and to which said indictments said defendant pleaded guilty, that the said pleas of guilty were made by said defendant unwillingly and involuntarily, and under the influence and duress of his fears of death or great bodily injury being inflicted upon him by a mob, if he did not so plead guilty to such indictments.”

A motion by the state for a new trial was made and overruled; findings of fact were made by the court in accordance with the verdict of the jury, and judgment was rendered by the court revoking the sentences and the pleas of guilty, awarding the accused a trial in each case, ordering his release from confinement in the penitentiary, directing the warden to deliver him to the jailer of Marion County, and directing the issuance of warrants for his arrest and commitment to the

jail of such county pending the trials to be had. The state in various ways interposed objections to the jurisdiction of the court, and to the sufficiency of the facts alleged and proved, interposed the statute of limitations in bar of the proceedings, and objected to the admissibility of some of the plaintiff's evidence, and preserved proper exceptions to all adverse rulings.

Before proceeding to the discussion of the questions presented by counsel as being involved in this case, it would be well to state that it is admitted by counsel that the proceedings in the lower court were civil in their nature, and not criminal, and that the remedy of petition in error, and not appeal, is the proper remedy in this court.

The first question presented by the state, which was the defendant below and is the plaintiff in error, is, that the court below had no jurisdiction to hear or determine any of the matters in controversy in this case, no power to set aside the aforesaid sentences or pleas, and no power to grant trials in the aforesaid criminal cases. It is admitted on the part of Calhoun, the defendant in the criminal cases, the plaintiff below in this proceeding, and the defendant in error in this court, that no express remedy is given to him, or to anyone else similarly situated, under any express provision of any statute; but he claims that he has a remedy under the principles of the common law, and inferentially under those provisions of the statute which recognize the existence and binding force of the common law. That the common law has existence in Kansas, in some cases and to some extent, we suppose all will admit. It has existence and force in all cases where the same is not inconsistent with the constitution or the statutes or the institutions of this country, and where, except for the common law, proper remedies for injustice and wrong, and for the redress of grievances, would not be furnished. The territory now occupied by the state of Kansas has belonged to the United States ever since the year 1803; and the government of the United States recognizes and enforces the common law everywhere, except where it is otherwise provided by the constitution or statutes, or where it is inconsistent with the institutions of this country. This same territory was also once, and from 1804 to 1812, under the jurisdiction and control of Indiana Territory: 2 U. S. Stats. at Large, 287; and was also once, from 1812 to 1820, under the jurisdiction and control of Missouri Territory: 2 U. S.

Stats. at Large, 743, et seq.; both of which territories recognized the common law. At the last-mentioned date, a portion of Missouri Territory was admitted into the union as a state: 8 U. S. Stats. at Large, 545. In 1854, the territory now constituting the state of Kansas became an organized territory; and from 1855 up to 1861 it was governed by its own territorial laws and the laws of the United States, when, in 1861, it became a state. As early as 1858 the following statute was enacted by the territorial legislature of Kansas, to wit: —

“Sec. 603. That rights of civil action, given or secured by existing laws, shall be prosecuted in the manner provided for by this code, except as provided in section 604. If a case ever arises in which an action for the enforcement or protection of a right, or the redress or prevention of a wrong, cannot be had under this code, the practice heretofore in use may be adopted, so far as may be necessary to prevent a failure of justice”: Civ. Code of 1858, sec. 603.

A similar statute has been in force ever since and is now in force: Civ. Code of 1868, sec. 727; Gen. Stats. of 1889, par. 4841. Also, the common law, by express enactment, has been in force in Kansas almost from the beginning. The present statute with regard thereto reads as follows:—

“Sec. 3. The common law, as modified by constitutional and statutory law, judicial decisions, and the condition and wants of the people, shall remain in force in aid of the general statutes of this state”: Gen. Stats. of 1889, par. 7281.

In the case of *Sattig v. Small*, 1 Kan. 174, which was decided in 1862, it is said, in the opinion of the court, among other things, as follows: “The common law was in force here when the organic act passed.” See, also, *Union Pac. R’y Co. v. Rollins*, 5 Kan. 175.

There are but few statutory actions in this state. Nearly every right of action in this state is founded upon and given only by the all-reaching principles of the common law, and generally it is only the procedure and not the right of action that is furnished or regulated by statute; and even as to procedure the statutes sometimes fail, and in such cases parties must resort to and invoke the aid of the common law. That such a remedy as the one resorted to by the plaintiff in this proceeding existed at common law, there can be no doubt; and we think it still exists wherever it is necessary to invoke its aid. See the case of *Sanders v. State*, 85 Ind. 318, 44 Am. Rep. 29, and the many authorities there cited. Is it possible

that a person, who under fear of mob violence and of death or great personal injury, is compelled to plead guilty to a criminal charge, and to be sentenced to imprisonment and hard labor in the penitentiary, is without remedy to restore to him his lost rights? But, if he has no remedy, then what becomes of the guaranties of our own state constitution? Sections 10 and 18 of the bill of rights of our constitution read as follows:—

“Sec. 10. In all prosecutions, the accused shall be allowed to appear and defend in person, or by counsel; to demand the nature and cause of the accusation against him; to meet the witness face to face, and to have compulsory process to compel the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed. No person shall be a witness against himself, or be twice put in jeopardy for the same offense.”

“Sec. 18. All persons, for injuries suffered in person, reputation, or property, shall have remedy by due course of law, and justice administered without delay.”

If any court has jurisdiction of proceedings like the present, it is in the district court. Under section 3, article 3, of the constitution, the supreme court has original jurisdiction only in proceedings in *quo warranto*, *mandamus*, and *habeas corpus*, and such appellate jurisdiction only as may be provided by law, and neither the constitution nor any statute has given to the supreme court, nor, indeed, to any other court, unless it is the district court, any jurisdiction in any proceeding like the present. Under section 1 of the act relating to district courts, the district court is made a court of record, and is given “general original jurisdiction of all matters, both civil and criminal, not otherwise provided by law”: Gen. Stats. of 1889, par. 1961. And jurisdiction like the present has not been otherwise provided for by the constitution or by any statute. Upon the whole, we think the district court, and it alone, has jurisdiction in cases like the present, and this opinion follows from a consideration of the common law and the constitution and the statutes both of this state and of the United States, viewed in the light of history and of usage, and under the decisions of our own courts and of the courts elsewhere.

But it is claimed that, even if the district court has jurisdiction in cases like the present, still that the plaintiff's

present action or proceeding was barred by some statute of limitations before it was commenced. The original pleas of guilty took place and the sentence and judgments following them were rendered on March 2, 1885, and this present proceeding was not commenced until some time in March, 1892, more than seven years having in the meantime elapsed; and it is now claimed by the state that the proceeding was barred, either by the two-years statute of limitations (Civ. Code, sec. 18, subd. 3), or by the five-years statute of limitations (same sec., subd. 6). There are decisions which hold that no statute of limitations can ever operate in cases like the present: *Powell v. Gott*, 13 Mo. 458; 53 Am. Dec. 153; *Latshaw v. McNees*, 50 Mo. 381. But it is not necessary, as we think, to hunt for decided cases. Our statutes govern. Section 19 of the Civil Code provides as follows:—

“Sec. 19. If a person entitled to bring an action other than for the recovery of real property, except for a penalty or a forfeiture, be, at the time the cause of action accrued, under any legal disability, every such person shall be entitled to bring such action within one year after such disability shall be removed.”

And section 1, subdivision 27, of the act relating to the construction of statutes, reads as follows:—

“27th. The phrase ‘under legal disability’ includes persons within the age of minority, or of unsound mind, or imprisoned”: Gen. Stats. of 1889, par. 6687.

But it is claimed on the part of the state that if the plaintiff in this proceeding was under such a legal disability that the statute of limitations would not run against such a proceeding, then that he was under such a legal disability that he could not commence or maintain the proceeding at all; or, in other words, it is claimed that if, from fears of his life or of great personal injury, and to avoid death or great personal injury, he pleaded guilty to a criminal charge, and was sentenced thereon to imprisonment and hard labor in the penitentiary for a term of years exceeding the time prescribed by the statute of limitations within which he could commence his action or proceeding, then that he was and is wholly without remedy; for he was under such a legal disability that he could not commence any such proceeding to set aside the sentence or the plea while imprisoned, nor until the term for which he was sentenced to imprisonment should expire. Under the statutes of limitations he would have one year

after the disability from imprisonment was removed within which to commence his action: Civ. Code, sec. 19. But could he not commence his action before the beginning of that year and while he was still imprisoned? What would be the use of his commencing any action or proceeding to relieve him from the consequences of his sentence after he had served in the penitentiary the full time for which he was sentenced? The commencing of any action or proceeding would then be of no benefit to him. It must be remembered that the plaintiff's imprisonment commenced before he made his pleas in the criminal cases, and has continued without any interruption up to the present time. While we think that, under the statutes, the plaintiff is and has been under such a legal disability that the statute of limitations has not operated against his remedy, yet we think that he has not been under such a legal disability as would prevent his commencing or maintaining an action to restore him to his just rights, provided, of course, that some friend would commence and conduct the proceeding for him. We do not think that the plaintiff's remedy in this case is barred by any statute of limitations.

The state also claims that the court below erred in excluding certain evidence. It appears that on May 25, 1892, the deposition of the plaintiff below, Calhoun, was taken in Leavenworth County, and presumably in the penitentiary, where he was confined. In that deposition he stated that the relation of attorney at law and client never existed between himself and C. W. Keller. Afterward, and on the trial of this case, which occurred on September 12, 1892, in Marion County, the deposition was read in evidence. Also, the oral testimony of Mr. Keller was introduced in evidence on the part of the plaintiff, Calhoun. It appeared from the testimony of both these witnesses that they had had a conversation about the last day of February, 1885, in the county jail of Marion County, where Calhoun was then imprisoned; and Mr. Keller also testified that at the time of this conversation he was employed as an attorney at law by Calhoun, and that the conversation then had was had between them in the relation of attorney and client. Notwithstanding this, the state offered to introduce the testimony of Mr. Keller to show what the conversation was, but Calhoun's counsel in this case, Frank Doster, objected, upon the ground that the conversation consisted of confidential communications had between them as

attorney and client; and the court excluded the evidence; and this the state claims was error. Calhoun himself was not present at the trial. We do not think that any error was committed in the exclusion of this evidence: Civ. Code, sec. 323, subd. 4. The court below heard the oral testimony of Mr. Keller, and could determine from it, and from Calhoun's deposition, very much better than we can whether the conversation had between Keller and Calhoun in the county jail was a confidential conversation had between them as attorney and client or not; and if it was such a conversation (and we must hold that it was), then the court below certainly did not err in excluding it. More than seven years had elapsed after the conversation had occurred, and before Mr. Calhoun's deposition was taken, and during all that time, except a few days, Calhoun had been confined in the penitentiary at hard labor; and it cannot be expected that his memory would be as good as that of Mr. Keller. It is probable that if he had had an opportunity to have had his memory refreshed by another conversation with Mr. Keller he would have made a different statement. We do not think that he was conclusively bound by his statement made in his deposition, but he had the right, through his counsel, to show by the testimony of Mr. Keller that the relation of attorney and client in fact existed between them at the time of the conversation had in the county jail in 1885, and therefore that what was said during that conversation could not be given in evidence over the objections of his counsel in this case.

It is further claimed that the court below erred in permitting the plaintiff, Calhoun, to prove threats made against his life, both before and after the pleas of guilty in the criminal cases, and threats not communicated to him before his pleas. We do not think that any error was committed in this respect. It was very proper to show the temper of the mob, for the purpose of showing whether any real danger existed as to the life of Calhoun, and these threats tended to show this fact. All the threats proved that were made after Calhoun entered his pleas of guilty were made on the same day, and before the mob had completely dispersed. Of course, it was a very important fact—indeed a necessary fact—as to whether Calhoun entertained fears of his life or great personal injury at the time he entered the pleas or not; but the fact that he had substantial grounds for such fears was another very impor-

tant fact, and it was proper that evidence of that fact should also be given to the jury.

It is also claimed that the court below erred in instructing the jury, in substance, that they had no right to consider the question of the guilt or innocence of Calhoun. We would think this instruction was correct. It can scarcely be possible that a mob, by compelling a person accused of crime to plead guilty thereto, and be sentenced to imprisonment and hard labor in the penitentiary, can thereby shift the burden of proof from the state to the accused. Can a mob by this means abrogate all presumptions of innocence? Can the mob cast the burden upon the accused of proving his innocence, and of proving it by a preponderance of the testimony, and relieve the state of proving his guilt, and of proving it by evidence sufficient to remove every reasonable doubt? A mob has no right, by any means, to shift the burden of proof from the state to the accused, or to relieve the state from proving the guilt of the accused beyond a reasonable doubt, and no right to compel the accused to prove his innocence, and to prove it by a preponderance of the evidence. The accused had the right to be placed back in the same condition as he was before he entered his pleas of guilty. He had the right to be placed back in such a condition that he could avail himself of all the right given to him by sections ten and eighteen of the bill of rights of the constitution, above quoted, and also of section two hundred and twenty-eight of the Criminal Code, and of all the other provisions of the constitution and the statutes adopted or enacted in the interest of fair trials and of liberty and justice. On the final trials in the criminal cases he can be fairly tried, and if his guilt shall then be fairly established, he can then be sentenced according to law. At the present, and in this proceeding, he is not required to establish his innocence. We think no error was committed in this respect.

It is further claimed by the state, that the court below erred in refusing to give a certain instruction that, if Calhoun entered his pleas of guilty because he was in fact guilty, and honestly desired to enter such pleas irrespective of any fear of mob violence, then that the fact that he was threatened with mob violence was not sufficient to avoid the sentence of the court. There are at least two sufficient answers to this claim of error: 1. The court in substance gave the instruction in its general charge; and, 2. The special findings of

the jury would cure any error that might have intervened in this respect.

After a careful consideration of all the points presented by counsel in this case, we are of the opinion that no substantial error was committed by the court below. With regard to actions or proceedings in this country in the nature of writs of error *coram nobis* a valuable note will be found appended to the case of *Holford v. Alexander*, 46 Am. Dec. 257-261. Upon the points made by counsel, our decision is as follows:—

1. Where the accused in a criminal prosecution in the district court is forced, through well-grounded fears of mob violence, to plead guilty to the criminal charge, and to be sentenced to imprisonment and hard labor in the penitentiary for a term of years, he has a right to relief from such sentence and plea by an action or proceeding in the same court in the nature of a writ of error *coram nobis*.

2. And in such a case, where the accused was sentenced to imprisonment in the penitentiary for a period of forty-two years, and, after having served for more than seven years of that term, he commences an action in the nature of a writ of error *coram nobis* to set aside such sentence and plea, his action is not barred by any statute of limitations, for the reason that no statute of limitations will operate against the remedy of a party while he is under the legal disability of imprisonment.

3. In such a case, where a deposition of the accused was read in evidence on the trial in his action for relief, and in such deposition was a statement made by him that the relation of attorney and client had never existed between himself and K.; but the oral testimony of K., introduced on the trial, showed that such relation did once exist, and that a certain conversation had between them more than seven years prior to that time and while that relation existed was a confidential conversation had between them as attorney and client, and the state offered to show what that conversation was; but the accused, through his counsel in the action for relief, objected, and the court excluded the evidence: Held, that the supreme court cannot say that any error was committed.

4. In such a case, where the trial court permitted the accused to show threats of mob violence made both before and after, but on the same day of the entering of his plea of guilty, and many of which threats were not communicated to the accused before his plea was entered, held, not error; that the

evidence tended to show that there was a real danger from mob violence, and that the fears of the accused were well founded, and that the evidence was proper to go to the jury.

5. And further held, that the question of the guilt or innocence of the accused in such a case is not a necessary question to be determined in the case; that a mob cannot, by compelling a person accused of crime to plead guilty and to be sentenced to imprisonment and hard labor in the penitentiary, so shift the burden of proof from the state to the accused as to compel the accused to prove his innocence, and to prove it by a preponderance of the testimony, and to relieve the state from proving his guilt, and from proving it by evidence sufficient to remove every reasonable doubt. The accused has the right to be placed back in the same condition as he was before he entered his plea of guilty.

6. And it is further held, that no error was committed in refusing instructions.

The judgment of the court below will be affirmed.

COMMON LAW OF ENGLAND—ADOPTION BY AMERICAN STATES. — This question is thoroughly discussed in *City of Parsons v. Lindsey*, 41 Kan. 336; 13 Am. St. Rep. 290, and note with the cases collected.

ERROR—CORAM NOBIS—WRITS OF—SCOPE AND EFFECT OF. — This question is treated fully in the extended notes to *Morrill v. Morrill*, 23 Am. St. Rep. 107, and *Holford v. Alexander*, 46 Am. Dec. 257-261.

ERROR CORAM NOBIS—LIMITATION. — A writ of error *coram nobis* may be brought at any time. The statutory limitation relates solely to errors of law: *Powell v. Gott*, 13 Mo. 458; 53 Am. Dec. 153.

LIMITATIONS OF ACTIONS. — DISABILITY OF IMPRISONMENT: See monographic note to *Moore v. Armstrong*, 36 Am. Dec. 72.

STATE v. PHIPPS.

[50 KANSAS, 609.]

TRADE, MEANING OF — WHEN THE TERM DOES NOT COMPREHEND INTER-STATE COMMERCE. — The word "trade," which was decided in the case of *In re Pinkney*, 47 Kan. 89, to comprehend the business of insurance, means trade between the citizens of the same state, and not trade between citizens of different states or interstate commerce.

INSURANCE NOT COMMERCE. — Issuing a policy of insurance is not a transaction of commerce.

STATES, POWER OF, TO REGULATE FOREIGN INSURANCE COMPANIES. — The state has power to regulate and control the business of a foreign insurance company within its boundaries, and to provide penalties for the transgression of the regulating and controlling statutes by means of which that power is exercised.

FOREIGN INSURANCE COMPANIES, POWER OF STATE TO PUNISH AGENTS OF.

The agents of foreign insurance companies who are carrying on business within the state may be convicted of violating an "act to declare unlawful trusts and combinations in restraint of trade and products, and to provide penalties therefor." The word "trade," as used in that statute, does not mean interstate commerce; and it may therefore be made to cover the transactions of such agents without placing its provisions in conflict with the powers of Congress to regulate commerce among the several states.

E. F. Ware, for the appellants.

John N. Ives, attorney-general, and *J. R. Hill*, county attorney, by *F. H. Atchinson*, deputy, for the state.

SIMPSON, C. W. C. Phipps and Theo. Gardner, with four others, were complained against by information in the district court of Labette County upon a charge of having violated chapter 257, Laws of 1889, being "An act to declare unlawful trusts and combinations in restraint of trade and products, and to provide penalties therefor." It seems from the record that only Phipps, Gardner, Neely, and McClure were arrested. The other two defendants were not served with process. At the trial the defendants Phipps and Gardner were found guilty, while the defendants James L. McClure and George A. Neely were found not guilty. Each of the appellants was fined one hundred dollars and costs. The specific charge was, that the accused were agents of various insurance companies organized under the laws of the states of New York, Colorado, Minnesota, and Connecticut; that they were doing business in this state, and that said insurance companies had combined to control the price and rate of insurance in the city of Oswego, Labette County, Kansas; that by agreement they had established certain rates larger than those existing before said combination; and that the accused, as agents and adjusters of said companies, were engaged in compelling local agents to observe such combination rates so established by said companies. The defendants Phipps and Gardner appeal to this court.

The counsel for the appellants contends (to state his proposition in general terms) that chapter 257, Laws of 1889, so far as it affects foreign insurance companies or their agents, is in conflict with the powers of Congress to regulate commerce among the several states, and for that reason void; or that the federal anti-trust law of July, 1890 (26 U. S. Stats. 209), is exclusive of the state law, and that all prosecutions for such offenses as are charged in this information must be com-

menced in the federal courts, and hence these appellants must be discharged. The counsel has filed an elaborate brief, and made a long oral argument, discussing the anti-trust law of this state and of the United States, the commerce clause of the federal constitution, and the power of Congress to legislate on that subject, as well as other branches of inquiry that may be involved in the proper discussion of this appeal.

The major premise of the argument in favor of the discharge of the appellants is, that this court has decided in a recent case that insurance is "trade," within the meaning of the provisions of the anti-trust law of this state, under which these appellants were prosecuted and convicted. The exact question in the case of *In re Pinkney*, 47 Kan. 89, was whether the word "trade," in the title to the anti-trust law (being chapter 257, Laws of 1889), so far as it relates to the business of insurance contained in the first section of the act, was broad enough to fairly indicate that such a provision with respect to insurance was a part of the act; and the court held the act valid, so far as it related to the business of insurance, that being covered by the title of the act. This is what the court did say:—

"The question presented is, does the word 'trade,' used in the title, fairly indicate and include the provisions of the act with reference to insurance? It is argued that the usual meaning of the word should govern, and in that sense it has reference to the business of selling or exchanging some tangible substance or commodity for money, or the business of dealing by way of sale or exchange in commodities; and it is said that the use of the word in connection with that of 'products' in the title, qualifies the meaning of 'trade,' and makes it all the more apparent that the construction contended for is the correct one. This is the commercial sense of the word, and possibly may be the most common signification which is given to it; but it is not the only one nor the most comprehensive meaning in which the word is properly used. In the broader sense it is any occupation or business carried on for subsistence or profit. . . . The broader signification given to the word by most of the lexicographers would fairly embrace and cover the provisions of the act with reference to the business of insurance. The title prefixed to an act may be broad and general, or it may be narrow and restricted; but in either event it must be a fair index of the provisions of the act. . . . That the broader meaning of the

word 'trade' was the one intended by the legislature is manifest from the incorporation of the insurance provision in the body of the act. . . . How can it be said that the business of insurance is foreign to the title of the act, when the subject expressed in the title, taken in its broadest sense, and the one intended by the legislature, would embrace such business?"

So it may be fairly said, as it is in the printed brief of counsel for appellants, that a legislative and judicial definition of insurance is that it is "trade" within the meaning of the anti-trust law of this state.

The minor premise of counsel is that trade, as defined by this court in the case of *In re Pinkney*, 47 Kan. 89, means interstate commerce. This is an assumption, rather than a fair and logical deduction, from the language used in the opinion. Trade between citizens of this state is not interstate commerce. Trade between a citizen of this state and a citizen of another state temporarily in this state is not interstate commerce. In fact, at the time the opinion in the case of *In re Pinkney*, 47 Kan. 89, was written there were no facts in the case that would suggest to the mind of the writer any question as to interstate commerce, because nowhere in the complaint, proceedings, or record of that case is it hinted that the unlawful combination intended and designed to control the cost of insurance was made or attempted by other persons than residents of the state of Kansas. So that it can be positively asserted that the word "trade," as used in that decision, meant then and means now, trade between citizens of this state,—domestic trade, if you please,—and not trade or commerce between citizens of different states or interstate commerce.

It is a conclusive presumption of the law that this court knew that the legislature of this state had no power to regulate interstate commerce, and the presumption is equally strong and conclusive that by the use of the word "trade" the intercourse between citizens of different states that constitutes interstate commerce was not in contemplation. It has been judicially determined, time and time again, by the highest judicial authority in the land, that issuing a policy of insurance is not a transaction of commerce. The supreme court of the United States, in the case of *Paul v. Virginia*, 8 Wall. 168, in an elaborate opinion by Mr. Justice Field, say: "The policies are simple contracts of indemnity against loss

by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter, offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one state to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different states. The policies do not take effect, are not executed contracts, until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the states any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce. In *Nathan v. Louisiana*, 8 How. 73, this court held that a law of that state imposing a tax on money and exchange brokers, who dealt entirely in the purchase and sale of foreign bills of exchange, was not in conflict with the constitutional power of Congress to regulate commerce. 'The individual thus using his money and credit,' said the court, 'is not engaged in commerce, but in supplying an instrument of commerce. He is less connected with it than the shipbuilder, without whose labor foreign commerce could not be carried on.' And the opinion shows that, although instruments of commerce, they are the subjects of state regulation, and, inferentially, that they may be subjects of direct state taxation. 'In determining,' said the court, 'on the nature and effect of a contract, we look to the *lex loci* where it was made, or where it was to be performed; and bills of exchange, foreign or domestic, constitute, it would seem, no exception to this rule. Some of the states have adopted a law merchant, others have not. The time within which a demand must be made on a bill, a protest entered, and notice given, and the damages to be recovered, vary with the usages and legal enactments of the different states. These laws, in various forms and in numerous cases, have been sanctioned by this court.' And again: 'For the purposes of revenue, the federal government has taxed bills of exchange, foreign and domestic, and promissory notes, whether issued by individuals or banks. Now,

the federal government can no more regulate the commerce of a state than a state can regulate the commerce of the federal government; and domestic bills or promissory notes are as necessary to the commerce of a state as foreign bills to the commerce of the Union. And if a tax on an exchange broker who deals in foreign bills be a regulation of foreign commerce or commerce between the states, much more would a tax upon state paper by congress be a tax on the commerce of a state.' If foreign bills of exchange may thus be the subject of state regulation, much more so may contracts of insurance against loss by fire."

The doctrine of this case was distinctly affirmed by the supreme court in the case of *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566, in which Mr. Justice Miller says: "The case of *Paul v. Virginia*, 8 Wall. 168, decided that the business of insurance, as ordinarily conducted, was not commerce, and that a corporation, having an agency by which it conducted business in another state, was not engaged in commerce between the states."

The case of *Paul v. Virginia*, 8 Wall. 168, was distinctly affirmed in the cases of *Doyle v. Continental Ins. Co.*, 94 U. S. 535, and *Philadelphia Fire Ass'n v. New York*, 119 U. S. 110, and has been cited approvingly in many other federal and numerous state decisions. It must now be regarded as the law of the land, in spite of the facetious criticisms of counsel for appellants.

In *Paul v. Virginia*, 8 Wall. 168, a statute of that state required that every insurance company not incorporated by Virginia should, as a condition of carrying on business in Virginia, deposit securities with the state treasurer and obtain a license; and another statute made it a penal offense for a person to act in Virginia as agent for an insurance company not incorporated by Virginia, without a license. Paul, having acted as such agent without a license, was convicted and fined under the statute. So that case arose out of an attempt on the part of the state of Virginia to enforce its penal laws for the regulation of the business of insurance within its borders. And in this respect it is very similar to the case we are now discussing.

In the case of *City of Leavenworth v. Booth*, 15 Kan. 628, which was the prosecution of a local agent of a foreign insurance company for a violation of a city ordinance that required foreign insurance companies to pay certain license taxes for

the privilege of doing business in said city, this court, by Mr. Justice Valentine, said: —

“It must be remembered that the insurance company involved in this controversy is a foreign insurance company, having no rights in this state except such as the state may see fit to confer upon it. It has no power to do business in Kansas by virtue of its organization in Wisconsin. It has no power to do business in Kansas by virtue of the laws of Wisconsin, or by virtue of the constitution or laws of the United States, or by virtue of all combined: *Paul v. Virginia*, 8 Wall. 168; *Ducat v. Chicago*, 10 Wall. 410; *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566. It can do business in Kansas only under the laws of Kansas, and by permission from the state of Kansas. This state might absolutely exclude it, or might require that it do business only under a license, and might require that it not only get a license from the state, but also that it get a license from every city, county, or village in which it should attempt to do business. The state may permit such insurance company to come into the state under such just restraints and regulations as the state may choose. Hence the state is not bound to permit said insurance company to come to this state (as individual citizens of other states have a right to do), and then, for the purpose of raising revenue, resort only to the ordinary modes of taxation. On the contrary, the state, without resorting to taxation at all, may require that such insurance company shall pay for the privilege of coming into the state, and of doing business therein, and may require that it shall not only pay a sum to the state for the privilege of doing business therein, but that it shall also pay a sum to every municipal corporation in the state in which it shall attempt to do business. And all this the state may do without violating any provision of its own constitution.”

This case asserts, in the strongest possible language, the right of this state to regulate the business of insurance within its borders, not only with reference to those insurance companies that may be organized under our laws, but especially with regard to insurance companies organized under the laws of sister states, doing or desiring to do business in this state.

At this writing it is probable that every state in the union has passed laws upon this subject, until it may be said that the right of state regulation of the business of insurance is universally recognized and upheld. So it can be confidently

said that this court, when it held, in *In re Pinkney*, 47 Kan. 89, that insurance was "trade," did not contemplate that the term used could be tortured into interstate commerce; and it can be said with equal confidence that the settled law of this country is that the issuing of a policy of insurance is not a transaction of commerce. As we have seen, neither the major nor minor premise of the argument of counsel for the appellants is sound, and the inevitable conclusion—that Congress alone has power to regulate interstate commerce, and to provide penalties against insurance trusts and combinations—does not follow. The court did not mean "trade" as synonymous with interstate commerce. The business of insurance is not interstate commerce. The state has power to regulate and control, and to provide penalties for the transgression of its regulating and controlling statutes, of the business of a foreign insurance company within its boundaries. If the theory of the counsel for the appellants ever ripens into authoritative judicial decision, the power of the state to regulate and control the business of insurance within its limits is gone. The insurance department, and every act upon the statute books for the protection of the policy holders, and every line looking to the punishment of the violators of its public policy in this respect, goes with it, except, possibly, as to such companies as may be organized and operated under the laws of the state.

We recommend that the judgment of conviction be affirmed.

By the COURT. It is so ordered.

VALENTINE and JOHNSON, JJ., concurring.

HORTON, C. J. I dissent from the judgment ordered, not however, upon the ground of the interstate character of insurance as urged by the attorney for the appellants, but because of my reasons for my dissent in the case of *In re Pinkney*, 47 Kan. 89. The subject of an act must be clearly expressed in its title. Chapter 257 is penal in its nature. The title thereof should not be extended by construction. Common or popular words are to be understood in a popular sense. In the construction of statutes a word which has two significations should ordinarily receive that meaning which is generally given to it. Considering the provisions of the constitution concerning titles to bills or acts, and the foregoing cardinal rules of construction, I do not think the word "trade,"

used in the title of said chapter 257, Laws of 1889, indicates or includes, in any public sense or as generally understood, lawyers, doctors, insurance agents, or insurance companies. When I speak of the profession or business of a lawyer, a doctor, or an insurance agent, I do not say he is a trader or tradesman, or is in trade, nor that he is carrying on a trade, or doing well in his trade. I have never heard any person, in referring to the success of a lawyer, a doctor, or an insurance agent, say of either that he is prosperous in his trade, or that he is doing well in carrying on his trade, or that he is an energetic trader. Indeed, I never have heard insurance agents spoken of as "in trade."

I think the decisions referred to in the foregoing opinion, except the one of this court in *In re Pinkney*, 47 Kan. 89, all tend to show that insurance is not "trade." The supreme court of the United States, in the case of *Paul v. Virginia*, 8 Wall. 168, cited, say insurance policies "are not subjects of trade and barter, offered in the market as something having an existence and value independent of the parties to them, they are not commodities to be shipped or forwarded from one state to another, and then put up for sale."

VALENTINE, J. I concur in the decision of this case and in affirming the judgment of the court below. It is evident from the body of the act (c. 257 of the Laws of 1889), that the legislature, in using the word "trade" in the title to the act, intended to include insurance, but did not intend to include interstate commerce; and it is the duty of the courts to carry out the will and intention of the legislature when enacted into law, and when the same can be fairly ascertained, and not to defeat the same, although the legislature may not have used the most appropriate language in expressing its will and intention. There is nothing in this case with reference to lawyers or doctors or their business or profession. Hence, it is wholly unnecessary to say anything with reference thereto.

FOREIGN INSURANCE COMPANIES—POWER OF STATE TO REGULATE.—A state legislature has authority to prescribe the terms upon which foreign insurance companies may transact business within the state: *Phoenix Ins. Co. v. Burdett*, 112 Ind. 204; *List v. Commonwealth*, 118 Pa. St. 322; *State v. Briggs*, 116 Ind. 55; *Haverhill Ins. Co. v. Prescott*, 42 N. H. 547; 80 Am. Dec. 123, and note; *Cincinnati etc. Ass. Co. v. Rosenthal*, 55 Ill. 85; 8 Am. Rep. 626. See also *People v. Fire Ass'n*, 92 N. Y. 311, 44 Am. Rep. 380, and extended note. A corporation of one state cannot do business in another without the latter's consent express or implied, and that consent may be accompanied with such conditions as the state may impose so long as

they are not repugnant to the laws of the United States: *Commonwealth v. New York etc. R. R. Co.*, 129 Pa. St. 463; 15 Am. St. Rep. 724, and note. Foreign corporations may make and enforce only such contracts as are not prohibited by the government where the contract is made or sought to be enforced: *Blair v. Perpetual Ins. Co.*, 10 Mo. 559; 47 Am. Dec. 129, and note; *Ducat v. Chicago*, 43 Ill. 172; 95 Am. Dec. 529, and note.

INSURANCE COMPANIES — POWER OF STATE TO PUNISH AGENTS OF. — It is competent for the legislature to provide a penalty against any agent of a foreign insurance company who shall act without authority from the state *Pierce v. People*, 106 Ill. 11; 46 Am. Rep. 683; *Ex parte Robinson*, 95 Ala. 622; *Bouhass v. Davis*, 90 Ala. 207; *State v. Briggs*, 116 Ind. 56.

AM. ST. REP., Vol. XXXIV.—11

remainder: See *Foster v. Shreve*, 6 Bush, 522. Such conveyances, thus construed, are effective, otherwise not; and as it must be presumed that the grantor intended all the parts of the deed to have the effect that the law gives to the language used, consequently it must also be presumed that he intended to grant a life estate, with remainder, unless, as intimated, the contrary intention appears.

But it is contended by the appellant that the language of the *habendum*, if it has any effect, creates an estate tail in Mrs. Bodine, which, under our statute, is converted into a fee-simple title; but, as said, the estate conveyed to Mrs. Bodine was a life estate, remainder to her children begotten by B. W. Bodine, and to construe the statute as raising this life estate to the dignity of a fee-simple estate would be absurd, and would wholly defeat the object of the grantor.

We have no hesitation in saying that the estate granted to Mrs. Bodine is not an estate tail, for an estate tail is an estate of inheritance, and descends to particular heirs; but the estate granted is a life estate, with remainder, etc., which is not an estate tail. Hence the statute has no application.

The judgment setting aside the sale to the appellee is affirmed.

DEEDS — CONSTRUCTION OF—HABENDUM CLAUSE. — The *habendum* clause of a deed yields to the granting clause where there is a clear repugnance between the nature of the estate granted and that limited in the *habendum*: *Ratliff v. Marra*, 87 Ky. 26; *Budd v. Brooke*, 3 Gill, 198; 43 Am. Dec. 321; *Brown v. Manter*, 21 N. H. 528; 53 Am. Dec. 223, and note; *Berry v. Bingham*, 44 Me. 416; 69 Am. Dec. 107, and note; *Flagg v. Hames*, 40 Vt. 16; 94 Am. Dec. 363, and note; *Rines v. Mansfield*, 96 Mo. 394; but the *habendum*, though repugnant to the estate previously granted, controls, if it is in accord with the intention of the grantor: *Fogarty v. Stack*, 86 Tenn. 610. See extended note to *Berridge v. Glassey*, 56 Am. Rep. 334; also *Bassett v. Badlong*, 77 Mich. 338; 18 Am. St. Rep. 404, and note.

ESTATES TAIL. — This subject is thoroughly discussed in *Outland v. Bowen*, 115 Ind. 150; 7 Am. St. Rep. 420, and extended note. See also *Doty v. Teller*, 54 N. J. L. 163; 33 Am. St. Rep. 670.

CHAMBERS v. BALDWIN.

[91 KENTUCKY, 121.]

MALICIOUS MOTIVES CANNOT MAKE A LAWFUL ACT WRONGFUL. — A lawful act, done in a lawful manner, cannot be transformed into a legal wrong by the mere fact that the person doing it is actuated by a bad motive.

CONTRACT, ACTION FOR PROCURING THE VIOLATION OF, WHETHER MAINTAINABLE. — An action cannot, in general, be maintained for inducing a third person to break his contract with the plaintiff. The only exceptions of which this rule admits are where apprentices, menial servants, and others, whose sole means of living is by manual labor, are enticed to leave their employment, or where a person has been procured, against his will or contrary to his purpose, by coercion or deception of another to break his contract.

CONTRACT, ALLEGATIONS INSUFFICIENT TO SUSTAIN AN ACTION FOR PROCURING VIOLATION OF. — No cause of action is stated by a petition which alleges that the plaintiff had made a contract with one W. whereby he sold and agreed to deliver to him during a certain period a quantity of tobacco; that the defendant, knowing of the existence of said contract, maliciously, and, on account of his ill-will to the petitioner, advised and procured W. who would else have kept and performed the agreement, to break it; that W. was at the time known by the defendant to be and now is insolvent; and that the petitioner brings suit because he is thus left without other redress.

Wall and Worthington, and Cochran and Son, for the appellants.

Wadsworth and Son, for the appellee.

LEWIS, J. The cause of action stated in the petition of appellants is, in substance: That as partners doing business under the firm name of Chambers and Marshall, they made a contract with one Wise, whereby he sold and agreed to deliver to them in good order, during delivery season of 1877, his half of a crop of tobacco, then undivided, which he had raised on shares upon the farm of appellee, in consideration whereof they promised to pay on delivery at the rate of five cents per pound; that they were ready, able, and willing to receive and pay for the tobacco as and at the time agreed on, and demanded of him compliance with the contract, but he had already delivered it to appellee and Newton Cooper, tobacco dealers, and then notified appellants he would not deliver it to them, and they might treat the contract as broken and at end; that appellee knew of the existence of said contract, but maliciously, on account of his personal ill-will to Chambers, one of appellants, and with design to injure by depriving them of profit on their purchase, and to benefit

himself by becoming purchaser in their stead, advised and procured Wise, who would else have kept and performed, to break the contract whereby they have been damaged — dollars; that he, Wise, was at the time known by appellee to be, and now is, insolvent; so, being without other redress, they bring this action.

Appellee is alleged to have been actuated to do the act complained of by ill-will to one of appellants only, which, however, to avoid confusion, we will treat as a malicious intent to injure both; and also by a design to benefit himself by becoming purchaser of the tobacco for the firm of which he was a member. And thus two questions of law arise on demurrer to the petition: 1. Whether one party to a contract can maintain an action against a person who has maliciously advised and procured the other party to break it; 2. Whether an act lawful in itself can become actionable solely because it was done maliciously.

As appellee, being no party to the contract, did not, nor could himself, break it, his wrong, if any, was in advising and procuring Wise to do so. Consequently, while the remedy of appellants against him, Wise, was by action *ex contractu*, recovery being limited to actual damage sustained, their action against appellee is, and could be in no other than form *ex delicto*, recovery, if any at all, not being so limited. Nevertheless, in Addison on Torts, volume 1, page 37, it is said: "Maliciously inducing a party to a contract to break his contract to the injury of the person with whom the contract was made creates that conjunction of wrong and damage which supports an action."

The authority cited in support of the proposition thus stated without qualification is the English case of *Lumley v. Gye*, 2 El. & B. 228, decided in 1853, followed by *Bowen v. Hall*, L. R. 6 Q. B. D. 333, decided in 1881, though it is proper to say there was a dissenting opinion in each case.

The action of *Lumley v. Gye*, 2 El. & B. 228, was in tort, the complaint being that the defendant maliciously enticed and procured a person under a binding contract to perform at plaintiff's theater, to refuse to perform and abandon the contract. The majority of judges held, and the case was decided upon the theory, that remedies given by the common law in such cases are not, in terms, limited to any description of servants or service, and the action could be maintained upon the principle laid down in Comyns's Digest, that "in all cases

where a man has a temporal loss or damage by the wrong of another, he may have an action upon the case, to be repaired in damages." The position of Justice Coleridge was, to the contrary, that as between master and servant there was an admitted exception to the general rule of the common law confining remedies by action to the contracting parties, dating from the statute of laborers, passed in 25 Edw. III., and both on principle and authority limited by it; and that "the existence of intention, that is, malice, will in some cases be an essential ingredient in order to constitute the wrongfulness and injurious nature of the act; but it will neither supply the want of the act itself or its hurtful consequences."

We have been referred to some American cases as being in harmony with the two cases mentioned. In *Walker v. Cronin*, 107 Mass. 555, it was held that where a contract exists by which a person has a legal right to continuance of services of workmen in business of manufacturing boots and shoes, and another knowingly and intentionally procures it to be violated, he may be held liable for the wrong, although he did it for the purpose of promoting his own business. But it was not alleged the defendant in that case had any such purpose in procuring the persons to leave and abandon the employment of the plaintiff, the real grievance complained of being damage by the wanton and malicious act of defendant and others. In *Haskins v. Royster*, 70 N. C. 601, 16 Am. Rep. 780, it was held that if a person maliciously entices laborers or croppers on a farm to break their contract and desert the service of their employer, damages may be recovered against him. But both those cases relate to rights and duties growing out of the relation of employer and persons agreeing to do labor and personal service, and do not apply here, except so far as the decisions rest upon other grounds than the statute of laborers. In *Jones v. Stanly*, 76 N. C. 355, it was, however, held that the same reasons which controlled the decision rendered in *Haskins v. Royster*, 70 N. C. 601, 16 Am. Rep. 780, "cover every case in which one person maliciously persuades another to break any contract with a third person; it is not confined to contracts for service." But we have not seen any other case in which the doctrine is stated so broadly.

Chesley v. King, 74 Me. 164, 43 Am. Rep. 569, we do not regard at all decisive, because the court went no farther than to say they were inclined to the view that there may be cases where an act, otherwise lawful, when done for the sole purpose

of damage to a person, without design to benefit the doer or others, may be an invasion of the legal rights of such person.

Cooley on Torts, 497, agreeing with Justice Coleridge, says: "An action cannot, in general, be maintained for inducing a third person to break his contract with the plaintiff, the consequence after all being only a broken contract, for which the party to the contract may have his remedy by suing upon it." And it seems to us that rule harmonizes with both principle and policy, and to it there can be safely and consistently made but two classes of exception; for as to make a contract binding, the parties must be competent to contract and do so freely, the natural and reasonable presumption is that each party enters into it with his eyes open, and purpose and expectation of looking alone to the other for redress in case of breach by him. One such exception was made by the English statute of laborers to apply where apprentices, menial servants, and others whose sole means of living was by manual labor, were enticed to leave their employment, and may be applied in this state in virtue of and as regulated by our own statutes. The other arises where a person has been procured against his will or contrary to his purpose, by coercion or deception of another, to break his contract: *Green v. Button*, 2 Crompt. M. & R. 707; *Ashley v. Dixon*, 48 N. Y. 430; 8 Am. Rep. 559.

But as Wise was not induced by either force or fraud to break the contract in question, it must be regarded as having been done of his own will and for his own benefit; and his voluntary and distinct act, not that of appellee, being the proximate cause of damage to appellants, they, according to a familiar and reasonable principle of law, cannot seek redress elsewhere than from him. That an action on the case will lie whenever there is concurrence of actual damage to the plaintiff, and wrongful act by the defendant, is a truism, yet unexplained, misleading. The act must not only be the direct cause of the damage, but a legal wrong, else it is *damnum absque injuria*. But whether a legal wrong has been done, for which the law affords reparation in damages, depends upon the nature of the act, and cannot be consistently or fitly made to depend upon the motive of the person doing it; for an act may be tortious, and consequently actionable, though not malicious, nor even willful. If it was not so, there could be no reparation for an act of pure negligence, though ever so hurtful in its effects. And it is just as plain that an act which does not of itself amount to a legal wrong without can-

not be made so by a bad motive accompanying it; for there is no logical process by which a lawful act done in a lawful way can be transformed or not into a legal wrong, according to the motive, bad or good, actuating the person doing it.

The proposition is clearly and forcibly stated in *Jenkins v. Fowler*, 24 Pa. St. 308, as follows: "Malicious motives make a bad case worse, but they cannot make that wrong which, in its own essence, is lawful. When a creditor who has a just debt brings a suit or issues execution, though he does it out of pure enmity to the debtor, he is safe. In slander, if the defendant proves the words spoken to be true, his intention to injure the plaintiff by proclaiming his infamy will not defeat justification. One who prosecutes another for a crime need not show he was actuated by correct feelings, if he can prove that there was good reason to believe the charge was well founded. In short, any transaction which would be lawful if the parties were friends cannot be made the foundation of an action merely because they happen to be enemies. As long as a man keeps himself within the law by doing no act which violates it, we must leave his motives to Him who searches hearts."

In *Frazier v. Brown*, 12 Ohio St. 294, the cause of action stated was diversion, with malicious intent by the defendant, of subterranean water on his own land from adjoining land of the plaintiff. But it was held there could be no recovery, because, as said by the court, "the act done, to wit, the using of one's own property, being lawful in itself, the motive with which it is done, whatever it may be as a matter of conscience, is in law a matter of indifference." In *Chatfield v. Wilson*, 28 Vt. 49, the action was for the same cause substantially, and the language of the court was: "An act legal in itself, and which violates no right, cannot be made actionable on account of the motive which induced it." In *Mahan v. Brown*, 18 Wend. 261, 28 Am. Dec. 461, the complaint was, that the defendant, wantonly and maliciously, erected on his own premises a high fence near to and in front of plaintiff's window, without benefit to himself, and for the sole purpose of annoying the plaintiff, thereby rendering her house uninhabitable. But it was held the action would not lie, because, no legal right of the plaintiff having been infringed, the defendant had not so used his property as to injure another, and whether his motive was good or bad she had no legal cause of complaint. To the same effect is the decided weight of authority

In the United States: *Adler v. Fenton*, 24 How. 412; *Phelps v. Nowlen*, 72 N. Y. 39; 28 Am. Rep. 93; *Benjamin v. Wheeler*, 8 Gray, 410; *Glendon Iron Co. v. Uhler*, 75 Pa. St. 467; 15 Am. Rep. 599; *Auburn etc. Road Co. v. Douglass*, 9 N. Y. 444.

Upon neither principle nor authority could this action have been maintained if the same thing it is complained appellee did had been done by a person on friendly terms with appellant, Chambers, or by a stranger, though he might have profited by the purchase to the damage of appellants; for, competition in every branch of business being not only lawful, but necessary and proper, no person should or can, upon principle, be made liable in damages for buying what may be freely offered for sale by a person having the right to sell, if done without fraud, merely because there may be a pre-existing contract between the seller and a rival in business, for a breach of which each party may have his legal remedy against the other; nor, the right to buy existing, should it make any difference, in a legal aspect, what motive influenced the purchaser. Competition frequently engenders not only a spirit of rivalry, but enmity, and if the motive influencing every business transaction that may result in injury or inconvenience to a business rival was made the test of its legality, litigation and strife would be vexatiously and unnecessarily increased, and the sale and exchange of commodities very much hindered. As pertinently inquired in *Auburn etc. Road Co. v. Douglass*, 9 N. Y. 444: "Independently of authority, if malignant motive is sufficient to make a man's dealings with his own property, when accompanied by damage to another, actionable, where is this principle to stop?" And as correctly said by Lord Coleridge in *Bowen v. Hall*, L. R. 6 Q. B. D. 333: "The inquiries to which this view of the law (making an act lawful or not, according to motive) would lead are dangerous and inexpedient inquiries for courts of justice; judges are not very fit for them, and juries are very unfit."

In our opinion, no cause of action is stated in the petition, and the demurrer was properly sustained.

Judgment affirmed.

CONTRACTS—ACTION FOR PROCURING THE BREACH OF.—Where the fulfillment of a contract with third persons is actually prevented through the procurement of the defendant an action will lie therefor: *Benton v. Pratt*, 2 Wend. 385; 20 Am. Dec. 623; *Rice v. Manley*, 66 N. Y. 82; 23 Am. Rep. 30. In *Ashley v. Dixon*, 48 N. Y. 430, 8 Am. Rep. 559, it was held that such an

action could not be maintained in the absence of fraud or misrepresentation on the part of the defendant in procuring the violation of the contract. The wrongful ouster of a tenant by a stranger is a cause of action to the landlord where he is injured by the loss of his rents, or on account of some damage to the premises caused thereby: *Walden v. Conn*, 84 Ky. 312; 4 Am. St. Rep. 204. This question is also discussed in *Bourlier v. Macauley*, 91 Ky. 135. See following case and note.

MALICE—ACTIONS FOR.—No action lies by the owner of a house against one who maliciously refuses to employ any tenant of such house and thus prevents the renting of it: *Heywood v. Tillson*, 75 Me. 225; 46 Am. Rep. 373. The question whether an act legal in itself becomes actionable on account of the malicious motives inducing it is discussed in *Phelps v. Nowlen*, 72 N. Y. 39, 28 Am. Rep. 93, and extended note; extended note to *Bixby v. Dunlap*, 22 Am. Rep. at page 489. See also the following case of *Bourlier v. Macauley*, 91 Ky. 135, where this question is also discussed.

BOURLIER v. MACAULEY.

[91 KENTUCKY, 135.]

MALICIOUS MOTIVES CANNOT MAKE A LAWFUL ACT WRONGFUL.—Whether an act is a legal wrong depends upon its nature and quality, not upon the motives of the person doing it. Malicious motives may make a bad case worse, but cannot make that wrong which in its own essence is lawful.

INDUCING A PERSON TO BREAK HIS CONTRACT WITH THE PLAINTIFF IS NOT IN ITSELF AN ACTIONABLE WRONG, and the mere fact that the defendant was actuated by malicious motives and by a purpose of injuring the plaintiff will not so change the character of what he has done as to convert it into a tort for which damages can be recovered.

MASTER AND SERVANT—ENTICING SERVANT TO LEAVE SERVICE—STATUTE CONSTRUED.—The Kentucky statute, which provides that any person who shall “willfully entice, persuade, or otherwise influence any person or persons who have contracted to labor for a fixed period of time to abandon such contract before such period of service shall have expired, without the consent of the employer, shall be fined not exceeding fifty dollars, and be liable to the party injured for such damage as he may have sustained,” is intended to apply, principally, to farm laborers, and should not be construed so as to cover contracts for the performances of dramatic artists.

INDUCING THIRD PERSON TO BREAK CONTRACT WITH PLAINTIFF, ACTION FOR, WHEN NOT MAINTAINABLE.—No cause of action is stated in a petition which alleges that the plaintiffs, being the owners of a theater, made a contract with the manager of a dramatic performer whereby it was agreed that certain performances were to be given, and that they complied with this contract in every respect, but that the defendant, the owner of a rival theater, although he had notice of the contract, with malicious intent to injure the reputation of the plaintiffs, wrongfully induced and procured the said dramatic performer to refuse to perform at their theater, and made a contract with the manager, which was carried out, for the giving of performances on the identical days on which it was agreed that they should be given at the plaintiffs' theater.

Kohn, Baird, and Speckert, for the appellant.

E. F. Trabus, for the appellee.

LEWIS, J. The cause of action stated in the petition of appellants is, in substance, that being owners of Masonic Temple Theater, in Louisville, they, in 1888, made a contract with H. E. Abbey, manager of Mary Anderson, a dramatic performer of great reputation, and her company, whereby it was agreed they were to perform there February 25, 26, and 27, 1889, which contract appellants complied with in every respect, having, at great expense, made necessary preparations for and advertised the performance; but that appellee, owner of a rival theater, though having notice of the contract, with malicious intent to injure the reputation of appellants, and of their theater as a first-class place of amusement, and their business, wrongfully induced and procured Mary Anderson to refuse to perform at their theater, and made a contract with Abbey, which was carried out, for performance of Mary Anderson and her company at his, appellee's, theater on the identical days it had been previously agreed they would perform at the theater of appellants, whereby they were injured in their credit and standing as theatrical managers, and deprived of profits they would have otherwise made, to their damage, etc.

Appellee is alleged, according to the plain meaning of the petition, to have done the act complained of as well with design to benefit himself, by securing performance of Mary Anderson and her company at his own theater, as with malicious intent to injure appellants; consequently two principal questions of law arise on demurrer to the petition: 1. Whether one party to a contract can maintain an action for damages against a person who maliciously advised and procured the other party to break it; 2. Whether an act lawful in itself can become actionable solely because it was done maliciously?

These two questions were considered and determined by this court in the case of *Chambers v. Baldwin*, 91 Ky. 121, *ante*, p. 165, and a rediscussion of them is therefore unnecessary. The cause of that action as stated in the petition was, that the plaintiffs, having made a contract with one Wise for sale and delivery of his crop of tobacco at a price agreed on, defendant, being also a tobacco dealer, maliciously, and with design to injure by depriving them of profit on their purchase, and to benefit himself by becoming purchaser in their stead,

advised and procured Wise, who would else have kept and performed, to break the contract.

It is however contended for appellant that the principle upon which the leading English case of *Lumley v. Gye*, 2 El. & B. 228, was decided, is correct and applicable to this. The complaint in that action was that the defendant maliciously enticed and procured a person, under a binding contract to perform at plaintiff's theater, to refuse to perform and abandon the contract; and in one count of the declaration there was an allegation not made in this case that the person had agreed to perform as, and had become and was, plaintiffs' dramatic artist when so procured to abandon the employment. But it is proper to say no distinction was taken by the court between the contract regarded as merely executory and as being in course of execution, the majority of judges deciding the action would lie in either case, while Justice Coleridge, who delivered a dissenting opinion, contended it would lie in neither.

Unlike this case, the act, made cause of action, was there alleged to have been committed with no other than a malicious motive, and inferentially for no other than a purpose to injure the plaintiff. But the dissimilarity is not material, because if the principle by which the decision of that case was controlled can be applied here, as there, without qualification or condition, this action will lie.

The theory upon which *Lumley v. Gye*, 2 El. & B. 228, seems to have been decided is, that remedies given by the common law in such cases as that are not limited to any description of servants or service, and the action was maintained upon the principle stated in Comyns's Digest that "in all cases where a man has a temporal loss or damage by the wrong of another, he may have an action upon the case, to be repaired in damages": Title "Action upon the lease (A)."

But it was held in *Chambers v. Baldwin*, 91 Ky. 121, *ante*, p. 165, that to maintain an action upon the case at common law, the act upon which it is founded must not only amount to a legal wrong, but be the proximate cause of the loss or damage sustained; and that upon principle, and according to decided weight of authority in the United States, whether a legal wrong has been done or not depends upon the nature and quality of the act, not upon the motive of the person doing it, the following clear and forcible statement of the proposition in *Jenkins v. Fowler*, 24 Pa. St. 308, being quoted and ap-

proved: "Malicious motives make a bad case worse, but they cannot make that wrong which in its own essence is lawful."

In reference to the other of the two main questions involved, it was there held that as the reasonable and necessary presumption in every case of a binding contract is that each party enters into it with his eyes open, and purpose and expectation of looking alone to the other party for redress in case of breach by him, the following rule, stated in Cooley on Torts, 497, and previously contended for by Justice Coleridge in *Lumley v. Gye*, 2 El. & B. 228, is correct on both principle and policy: "An action cannot, in general, be maintained for inducing a third person to break his contract, the consequence after all being only a broken contract, for which the party to the contract may have his remedy by suing upon it." And it was further held that there can be consistently and safely but two classes of exception to that rule. One was made by the English statute of laborers, passed in 25 Edw. III., to apply where apprentices, menial servants, and others, whose sole means of living was by manual labor, were enticed to leave their employment, and may be applied in this state in virtue of and as regulated by our own statute. The other arises where one party to a contract has been procured against his will or contrary to his purpose, by coercion or deception of a person, to break it to the damage of the other party.

If the opinion of this court in that case is to stand, it does not make any difference whether appellee was actuated by merely malicious motives to injure appellants, or by that and the additional one of personal benefit; and it is therefore necessary to inquire whether the facts stated bring this case within the first-named exception to the rule that only a party to a contract can be sued for its breach, the other exception manifestly having no application; but of course the question whether the act was in itself a legal wrong is always, in such case, vital and precedent.

It is not the policy of the law to restrict or discourage competition in any business or occupation, whether concerning property or personal service, there being no good reason for making more stringent regulations in respect to the latter, except where some one of the domestic relations exists, than the former; for if, in order to leave sale and exchange of property free and unrestrained, a person may lawfully, and without legal inquisition of his motive, buy what another offers for sale,

and has right to sell, it is no less just and expedient that in order to have fair remuneration for labor, a person be allowed to hire the service of anyone *sui juris* who offers to be hired; and in every case the employer should be required to look alone to the person employed for breach of the contract, just as the seller must look to the buyer and the creditor to the debtor in default of payment; for to enforce a doctrine making the hirer responsible for breach by the person hired of a previous contract with another involves legal recognition of personal dominion bordering on pure servitude, which is neither in harmony with our form of government nor well for those who labor for subsistence; and such doctrine can be applied in this state only where expressly provided by statute, and being arbitrary, should be extended no further than was clearly intended by the legislature.

Chapter 74, General Statutes, prescribes rights and duties growing out of the relation of master and apprentice, and article 2 thereof provides, as was done by the statute of 1798, that persons who come into this state under a contract to serve another in any occupation shall be compelled to perform the contract specifically during the time thereof, not exceeding seven years; but the only existing statutory provision which authorizes another than a party to it to sue for a breach of contract is section 13, article 14, chapter 29, as follows: "If any person shall willfully entice, persuade, or otherwise influence any person or persons who have contracted to labor for a fixed period of time to abandon such contract before such period of service shall have expired, without the consent of the employer, shall be fined not exceeding fifty dollars, and be liable to the party injured for such damage as he or they may have sustained."

We are satisfied that statute, passed soon after slavery ceased to exist in this state, and consequent change of the labor system took place, was intended to apply principally to farm laborers, and to extend application of it so as to include contracts for performance of dramatic artists, would be not only fraught with much injustice, unnecessary strife, and litigation, but entirely beyond the intended scope and operation of it.

In our opinion, the only remedy appellants have is against Abbey, who made, and whose voluntary breach of the contract was, the direct cause of the alleged loss and damage, and the action cannot be maintained against appellee.

Judgment affirmed.

MALICIOUS MOTIVES—WHETHER MAKE LAWFUL ACTS WRONGFUL.—This question is discussed in *Chambers v. Baldwin*, 91 Ky. 121, ante 165, and note.

CONTRACTS—PROCURING THE BREAKING OF—WHETHER ACTIONABLE.—For a full discussion of this subject see *Chambers v. Baldwin*, 91 Ky. 121, ante 165, and note.

MASTER AND SERVANT—ENTICING SERVANT TO LEAVE EMPLOYMENT.—**ACTION FOR:** See extended note to *Birby v. Dunlap*, 22 Am. Rep. 485, and *Haskins v. Royster*, 70 N. C. 601, 16 Am. Rep. 780, where the question is fully treated. A railroad company may recover damages of one who maliciously causes the arrest of an engineer in charge of a train with intent to delay the train and injure the company: *St. Johnsbury etc. R. R. Co. v. Hunt*, 55 Vt. 570; 45 Am. Rep. 639. An action lies for enticing away an agricultural laborer employed upon an agreement for a part of the crop made, for his compensation: *Huff v. Watkins*, 15 S. C. 82; 40 Am. Rep. 680. To the same effect, *Daniel v. Swarengen*, 6 S. C. 297; 24 Am. Rep. 471.

RICKETTS v. LOUISVILLE ETC. R'Y Co.

[91 KENTUCKY, 221.]

GRANTS MAY BE REVOKED BY VIRTUE OF A POWER EXPRESSLY RESERVED IN THE DEED.—Since the deed is notice to the grantee's creditors that the power of revocation is reserved, such a condition cannot be assailed on the ground that it is contrary to public policy in enabling the parties to the instrument to defeat the rights of such creditors.

DEEDS—CONDITIONS SUBSEQUENT.—An estate which has once been vested in the grantee cannot be defeated by a condition subsequent which is either impossible, illegal, or repugnant to the estate granted.

DEEDS—CONDITIONS SUBSEQUENT—RECORDING STATUTES.—A condition subsequent in the form of a power of revocation reserved in a deed will not be deemed impossible of execution, on the ground that the deed provides that the revocation shall be by an instrument to be acknowledged and recorded, as in the case of a deed to land. The right of revocation is not lost merely because the grantor has thus prescribed as a part of the proceedings by which the revocation is to be carried into effect, some formality which the law does not recognize. In such a case, therefore, the provision that the revocation is to be acknowledged and recorded is not to be regarded as so far of the essence or substance of the right as to defeat it.

DEEDS—REVOCATION CLAUSE, VALIDITY OF.—Where a deed refers to a revocation of the grant which might thereafter be acknowledged and recorded in like manner as the deed itself, the revocation when afterwards carried into effect, should be treated as part and parcel of the deed. Hence, although the recording statutes do not provide for the acknowledgment and recording of instruments revoking a grant, the county clerk has, under such circumstances, the power to take the acknowledgment and record the revocation.

Kendall and Moreman, and J. W. Lewis, for the appellants.

Helm and Bruce, for the appellee.

HOLT, C. J. December 15, 1884, the appellant, Agnes Ricketts, executed to her son, James Ricketts, a deed to a tract of land, which contained this provision:—

“I hereby reserve to myself the power to revoke and annul this conveyance at any time during my natural life by a deed or other instrument under seal, signed and acknowledged by me as deeds of land are required by the statutes of Kentucky to be signed and acknowledged, which said revocation, to be valid and effectual, must be lodged for record in the said county clerk's office of Meade County in my lifetime. In the event of my exercising the said power of revocation herein reserved, the property and title to said land to reinvest in me as it exists at the time of the execution of this deed, any attempted deed, alienation, or encumbrance thereon by the grantee herein to the contrary notwithstanding.”

The grantee accepted the deed on the day of its acknowledgment by a written acceptance indorsed upon it. March 24, 1887, James Ricketts, for a nominal money consideration, and in view of expected benefits to arise from the building of the railroad, granted, by a proper deed to the appellee, a sixty-foot right of way through the land, and it thereupon proceeded to and did construct its road through it. If this grant was not subject to a power of revocation by Agnes Ricketts by virtue of the deed from her to her son, then the right of the road by virtue of the deed from the son is unquestioned. August 6, 1889, she executed, in conformity to the provision in the deed from her to her son, what is termed in this record “a deed of revocation.” It was acknowledged by her before the county clerk of Meade County, and by him recorded. She then brought this action against the appellee for damages, claiming that it had unlawfully entered upon the land and constructed its road. The action was dismissed upon a demurrer to the first paragraph of the reply, which asserts the validity of the revocation, and this is the only question presented by this appeal.

It is insisted for the appellee that the deed to James Ricketts invested him with the fee, and that the revocation clause was an attempt to impose a condition subsequent, which is void: 1. Because it is contrary to public policy; and, 2. Because it is impossible of execution. The ground upon which it is assailed as being against public policy is, that it will enable the parties to the deed to defeat the rights of the grantee's creditors. In other words, that after becoming in-

debted, the grantor will exercise the power of revocation, and thereby divest the grantee of property which would otherwise go in satisfaction of the claims of his creditors. This ground cannot be maintained. The deed is notice to the creditors of the reserved power. If they trust the grantee upon the credit of the estate thus granted, they do so knowing the risk, because the deed gives them notice of it. Such a condition has always been known to the law of conveyancing. Coke says that grants may be revoked by virtue of a power expressly reserved in the deed: *Butler's Case*, 3 Coke, 25. The condition was not, therefore, unlawful upon this ground, and the second one remains to be considered, and which is the one mainly urged. If the condition annexed to a conveyance be subsequent, the estate passes, although the condition is never performed, or by reason of illegality is incapable of performance: *Myers v. Daviess*, 10 B. Mon. 397.

Blackstone, in speaking of such conditions, says: "If they be impossible at the time of their creation or afterward become impossible by the act of God, or the act of the feoffor himself, or if they be contrary to law or repugnant to the nature of the estate, are void; in any of which cases, if they be conditions subsequent, that is, to be performed after the estate is vested, the estate shall become absolute in the tenant. As if a feoffment be made to a man in fee simple, on condition that unless he goes to Rome in twenty-four hours; or unless he marries with Jane S. by such a day (within which time the woman dies, or the feoffor marries her himself); or unless he kills another; or in case he aliens in fee; that then, and in any of such cases, the estate shall be vacated and determine; here the condition is void, and the estate made absolute in feoffee. For he hath by the grant the estate vested in him, which shall not be defeated afterwards by a condition either impossible, illegal, or repugnant": 2 Blackstone's Commentaries, 156.

It is asserted that applying this rule to the conveyance from the appellant to her son, the fee vested in him, and that the condition in the form of a revocation as therein provided was impossible of execution. This is claimed upon the ground that the deed provided that the revocation should be by an instrument to be acknowledged by the grantor before the county clerk, and recorded by him as in case of a deed to land, and that our statute does not authorize the acknowledgment and recording of such an instrument. It is true the

county clerk has no power in the matter except as given by our statute, and it does not expressly authorize him to take the acknowledgment, and record an instrument like that in question. Where, however, a grantor has reserved a power of revocation, and which, in the absence of a particular provision as to the manner of its enforcement, could, under the old rule have been carried out by re-entry merely, or now by proper notice to the grantee, it seems to us that it would be a sacrifice of substance to form to hold that the right was lost because the grantor, in providing as to the mode in which it should be done, has provided something as to the mere form of the revocation which the law does not recognize. This should not deprive him of the right to which both he and the grantee have assented. If so, it would defeat the intention of the parties to the conveyance. Even if the act of the county clerk had no legal efficacy, yet it having been done, and as provided in the deed, which reserved the power, it should operate to carry out the intention of the parties, and of which every one had notice by the recording of the deed. It should not be regarded as illegal, and therefore rendering void the power of revocation. The provision that the revocation was to be acknowledged and recorded should not so far be regarded as of the essence of substance of the right as to defeat it, even if the statute does not authorize the acknowledgment and recording of such an instrument. The deed, however, referred to a revocation which might thereafter be acknowledged and recorded in like manner as the deed itself, and the revocation should be regarded and treated as part and parcel of the deed. In this view we think the power existed in the clerk to take the acknowledgment and record the revocation.

The demurrer to the first paragraph of the reply should have been overruled, and the judgment is reversed, with directions to do so, and for further proper proceedings.

DEEDS — RESERVATIONS — VALIDITY. — The rule that a reservation which is repugnant to the granting part of a deed is null and void applies only in cases where the intention of the parties cannot be ascertained, or if ascertained, cannot be carried into effect in accordance with the established principles of law: *Bassett v. Budlong*, 77 Mich. 338; 18 Am. St. Rep. 404, and note with cases collected.

DEEDS — CONDITIONS SUBSEQUENT. — Conditions subsequent are not favored by the law, and are very rarely enforced in equity so as to divest an estate for a breach: *Thompson v. Thompson*, 9 Ind. 323; 68 Am. Dec. 638, and note; *Taylor v. Sutton*, 15 Ga. 103; 60 Am. Dec. 682, and note; *Emerson v. Simpson*, 43 N. H. 475; 82 Am. Dec. 168, and note; *Rawson v. School District*,

7 Allen, 125; 83 Am. Dec. 670, and note. Conditions subsequent are not favored in law, and are always strictly construed, since they tend to destroy estates: *Peden v. Chicago etc. Ry Co.*, 73 Iowa, 328; 5 Am. St. Rep. 690, and note. See also extended note to *Cross v. Carson*, 44 Am. Dec. 744.

HARRISON v. LEBANON WATERWORKS.

[91 KENTUCKY, 255.]

JUDGMENTS OR ORDERS FROM WHICH AN APPEAL WILL LIE are those which either terminate the action itself or operate to divest some right in such a manner as to put it out of the power of the court making the order to place the parties in their original condition after the expiration of the term.

AN APPEAL WILL LIE FROM AN ORDER which refuses to grant the petition of persons asking to be made parties to a suit, or has the effect of dismissing an action as to one or more plaintiffs, or operates to deprive one or more defendants of the benefit of an answer filed. In each of these cases there is a final determination of the action as regards the particular party or parties affected by such order.

PLEADINGS, VERIFICATION OF, WHEN NECESSARY. — Where one section of a statute provides that a joint pleading of several parties who are united in interest may be verified by any one of them, and a subsequent section provides that, on motion of a party who files his affidavit, stating his belief that an adverse party, whose pleading has been verified by a person other than himself, knows that a statement thereof mentioned in the affidavit is untrue, the court, if such statement is material, shall require the adverse party to verify the pleading, and if he fail to do so within a reasonable time, shall treat it, with regard to him, as if it had not been filed, the latter section will be deemed to qualify the former, and the pleading of a party, whether filed by him alone or jointly with others, will be treated, in regard to him, as a nullity, if he refuses to verify it under the circumstances specified in the latter section.

W. B. Harrison, for the appellants.

Samuel Avritt, for the appellee.

LEWIS, J. This action was brought against appellees, the trustees of Lebanon and the Lebanon Waterworks Company by appellant Lanham, with whom were united as plaintiffs, Cambron, Ballard, and Edmunds, but they subsequently withdrew from the action.

November 28, 1888, there was filed in court an amended petition, in which it was stated: "Lanham and W. B. Harrison now unite in amending the petition; the said Harrison is hereby made a plaintiff, and adopts the statements in the original petition and in the amended petition filed in this case within the last five days."

December 10th, appellees made a motion that the plaintiffs verify their petition, and thereupon as recited in the order, "came W. B. Harrison, one of the plaintiffs, and verified said petition."

December 11th, a motion was made, based on an affidavit required in such case, for a rule against appellant Lanham to verify the petition and amended petition; and he having refused to obey the rule issued on that motion, an order of court was made December 12th, in substance, that said pleadings be treated in regard to him as if they had not been filed to which Lanham excepted; and December 13th, the action was, by order of court, continued. But December 14th, an entry was made showing that W. B. Harrison, styled plaintiff, produced his bill of exception, which was signed, enrolled, and ordered to be filed.

At the March term, 1889, was entered the following: "The court, being of the opinion that the order made at the last term of this court as to the plaintiff Lanham, finally disposed of and put the case out of court, refused to rule the defendants to answer, and orders and adjudge that there is no case in court. To which ruling of the court the said Harrison excepts, and prays an appeal," etc.

The statement filed with the transcript shows both Lanham and Harrison as appellants; but the first question to be considered is whether an appeal will lie in behalf of either.

By section 368, Civil Code, a judgment is defined "a final determination of a right of a party in an action or proceeding"; and section 513 provides that "a judgment rendered in the circuit court may be reversed, vacated, or modified either by it or by the court of appeals."

Section 763 is as follows: "Neither a void judgment, nor a judgment against a defendant who shall have been only constructively summoned, and shall not have appeared in the action; nor any judgment which can be set aside or modified by the court which rendered it, upon motion made after the term during which it was rendered, shall be reversed or modified by the court of appeals, until a motion to set aside or modify the judgment shall have been made in the inferior court and overruled."

A final order or judgment from which an appeal will lie in this court, either terminates the action itself, or operates to divest some right in such manner as to put it out of the power of the court making the order, after the expiration of the

term, to place the parties in their original condition: *Marysville etc. R. R. Co. v. Punnett*, 15 B. Mon. 47; *Turner v. Browder*, 18 B. Mon. 826; *Applegate v. Applegate*, 4 Met. (Ky). 236; *Helm v. Short*, 7 Bush, 625.

By subsection 4, section 117, it is provided that on motion of a party who files his affidavit, stating his belief that an adverse party whose pleading has been verified by a person other than himself, knows that a statement thereof in the affidavit mentioned is untrue, and that the motion is not made for delay, the court, if such statement be material, shall require such adverse party to verify the pleading; and if he fail to do so within a reasonable time, shall treat it, with regard to him, as if it had not been filed.

The order of court made upon failure of Lanham to verify his pleading is, we think in conformity with and operates, as was intended by that section, to terminate the action as regards him, and moreover, to put it out of the power of the court after the expiration of the term to place him in his original condition. For the only causes for which a court may modify or vacate its judgment after expiration of the term during which it was rendered are prescribed in sections 414, 516 and 517, none of which apply in this case.

It has been distinctly held that an order refusing to permit persons filing petitions for that purpose to be made parties may be appealed from: *Berry v. Hamilton*, 1 Bush, 361. And we do not see why an order having the effect of dismissing an action as to one or more plaintiffs, or one operating to deprive one or more defendants of the benefit of an answer filed, should not as well be appealed from; for it is, in one case as much as another, a final determination of the action as regards the particular party or parties affected by such order. In our opinion the judgment complained of by appellants is subject to revision by this court, but we see no error in it as to Lanham.

Subsection 4, section 117, was evidently intended as qualification of that part of subsection 3 which provides that a joint pleading of several parties who are united in interest may be verified by either of them; and, therefore, the pleading of a party, whether filed by him alone or jointly with others, is to be treated in regard to him as a nullity, if he refuses to verify it when the opposite party files the affidavit mentioned, and the statement or statements alleged to be untrue are material, as seems to be the case here.

But Harrison had become a party plaintiff before the order was made in reference to Lanham, and did not lose his standing in court, nor could be prejudiced by that order; for though he did not file a petition, nor enter a formal motion to be made a party, he united in and verified the amended petition, in which it is stated he was a party, and without objection he was treated, and named in various orders of court and in the bill of exceptions, as a party plaintiff.

Notwithstanding the order made December 12, 1888, was final and effectual as to Lanham, it did not, it seems to us, have the effect, as said by the lower court in the judgment at the March term, of finally disposing of and putting the case out of court; for not only was an order of continuance made December 13th, but the bill of exceptions was produced by Harrison and signed by the judge December 14, 1888. In our opinion, as Harrison has shown he has an interest in the subject of the action, and in obtaining the relief demanded, he had a right to be joined as plaintiff, and having become a party of record without objection of the defendants, he may maintain the action, and consequently the judgment of March, 1889, was erroneous and prejudicial to him.

The judgment is affirmed as to appellant Lanham, but reversed on the appeal of Harrison, and cause remanded for answer by the defendants, and further proceedings consistent with this opinion.

APPEAL, WHAT JUDGMENTS OR ORDERS SUBJECT TO. — The right of appeal is limited in general to final judgments, and does not extend to interlocutory orders: *Davis v. Davis*, 52 Ark. 224; 20 Am. St. Rep. 170, and extended note with cases collected. An appeal from an interlocutory order, decision, or judgment will not operate as a *superseas* unless a justice of the supreme court or the judge of the circuit court, upon an inspection of the record, shall think fit to order such stay of proceedings: *Tampa etc. R'y etc. Co. v. Tampa etc. R. R. Co.*, 30 Fla. 400. An appeal will not lie from an order of a probate court appointing an administrator: *State v. Fowler*, 108 Mo. 465; nor from a refusal to dismiss an action, nor from an order adjudging that the defendants were duly served with process: *Luttrell v. Martin*, 111 N. C. 523. See also *Rolley v. Creditors*, 44 La. Ann. 370.

WILLIAMSON v. YAGER.

[91 KENTUCKY, 282.]

CONTRACTS — CONSIDERATION, SUFFICIENCY OF. — A consideration moving from one person will uphold a promise to, or an agreement made with, a third person.

ASSIGNMENT OF NOTES WITHOUT DELIVERY, WHEN WILL BE ENFORCED. — Where the maker of certain promissory notes is requested by one who holds them under the will of the payee to execute new ones for the same amounts, but refuses to do so for the reason that he has not received proper credits, and only consents to sign them upon receiving a promise from the holder that they are to be assigned to his children, there is a valuable consideration to support a subsequent assignment of the notes by a written indorsement thereon, and, although the holder of the notes does not deliver them to the assignees, such assignment will be enforced by compelling a delivery.

GIFTS — DECLARATION OF DONOR THAT HE HOLDS IN TRUST FOR DONEE. — The title to personal property may be transferred by a clear and unequivocal declaration on the part of the donor that he holds the property in trust for the donee, or by acts which are equivalent to such a declaration. Under these circumstances, if the donee shows that the donor has left nothing undone that is necessary to create the trust, and nothing is required of the court but to give effect to it as an executed trust, it will be enforced, although it was without consideration, and the possession of the property has not been changed.

HUSBAND AND WIFE — POWER OF WIFE TO DISPOSE OF HER SEPARATE ESTATE. — Where a married woman has reserved, in one of the clauses of an antenuptial agreement, the full control of all her estate, with power to dispose of or manage it as she thinks proper, she will be deemed to have an absolute right to dispose of her property at any time, as she pleases, and another clause of the agreement which provides that the rents and interest accruing from the property of both spouses should be for their joint benefit, cannot be construed so as to give her merely the power to alienate her property after her husband's death.

Muir, Heyman and Muir, and J. C. Beckham, for the appellant.

Humphrey and Davis, and L. C. Willis, for the appellees.

BENNETT, J. The question is, did the seven notes—two for one thousand dollars each and five for eight hundred dollars each—pass as a gift from the appellant to the seven appellees, children of Henry C. Yager? The undisputed facts are these: Henry C. Yager was in his lifetime indebted to his brother, Silas B. Yager, in a large sum; and after the death of Silas B. Yager, the appellant, being entitled to said indebtedness by the devise of her husband, Silas B. Yager, caused, on the first day of June of 1880, Henry C. Yager to execute new notes to her for said amount seven of which were

executed for the respective sums indicated. On the same day the appellant, by written assignment on the back of each note, assigned it to each of the seven appellees. The following is the assignment, differing only in the names of the assignees:—

“I hereby assign this note to Henry T. Yager, with six per cent interest from date, the interest and principal to be paid to said Henry T. Yager at the settlement of H. C. Yager’s estate.
LUISA Y. WILLIAMSON.”

Said notes were not delivered to the appellees, but were retained by the appellant, and she thereafter erased the assignment upon each note, and brought suit thereon against Henry C. Yager, together with three other notes taken from him at the same time, and obtained judgment by default thereon; but the judgment was not collected, except a part of the interest on the three notes last mentioned. Henry C. Yager having died, said seven children, appellees, brought this action to have said seven notes declared to be theirs, by reason, first, of said assignment for a valuable consideration; or, second, by reason of a declaration of trust by the appellant.

As to the first proposition, the weight of the evidence is that on the occasion of Henry C. Yager executing the notes, he objected to doing so for the reason that he had not received proper credits, but upon appellants agreeing to give said notes to the appellees, he signed them; and, pursuant to said agreement, the appellant did assign them to the appellees. Now, this contention for additional credits and refusal to sign the notes because they were not given, and the agreement of the appellant to give them to the appellees if he would sign them, and on that consideration he did sign them, certainly constitutes a valuable consideration for the assignment of them to the appellees, which consideration is sufficient to authorize the enforcement of the contract of assignment, notwithstanding the fact that the appellant did not deliver the possession of the notes to the appellees. The valuable consideration for the transfer of title gave the transfer legal efficacy, which will be enforced by compelling a delivery of the thing itself. It is also well settled that a consideration moving from one person will uphold a promise to or an agreement made with a third person.

But if we are mistaken about the transfer having been made upon a valuable consideration, we are clear that the

title to these notes passed to the appellees by a declaration of trust. The correct rule upon this subject seems to be epitomized in volume 8, American and English Encyclopædia of Law, page 1323. It is there said that the title to personal property may be transferred without delivery of possession, or without consideration, by a declaration of trust. That the title to personal property can ordinarily only be transferred by way of gift, by a delivery of the property actually or constructively to the donee, or to some person in trust for him. Also the donor may constitute himself a trustee for the donee, but in order to do this, it is necessary for the donor to clearly and unequivocally declare that he henceforth holds the property as trustee for the donee. This declaration may be done by so many words, or by acts amounting to the same thing. When this trust is clearly created by the donor, equity will uphold it and treat the gift as executed.

If one delivers possession of personal property to a trustee to hold as a gift for the donee, it is certainly a valid gift, and if he expressly says or does acts amounting to the same thing, that he constitutes himself a trustee to hold the property for the donee, we perceive no reason why this should not be as valid and binding as a delivery of the property to a third person, to be held in trust for the donee, the only difference being that in the first-named case the trust, by clear and explicit language, or acts amounting to the same thing, should be perfectly created in order to prevent the confounding of the trust with an imperfect gift. Therefore, in seeking to enforce the trust, the donee must show that the donor has left nothing undone that is necessary to create it; and if it appears that the donor has yet to make a conveyance to the donee, the trust will not be enforced, because not perfectly created; but if nothing is required of the court but to give effect to the trust as an executed trust, it will be carried into effect, although it was without consideration, and the possession of the property was not changed. This is upon the broad principle that in such matters a party may make himself trustee as well as a third person.

This court is in line with the foregoing views. In *Barkley v. Lane*, 6 Bush, 589, it is said: "Nor was it essential to the validity of the trust that a trustee be formally appointed, as the owner of the property may convert himself into a trustee, and hold it for the benefit of another without transmitting the possession." In that case there was a gift without deliv-

ery of possession or without consideration, but the owner had clearly and explicitly made himself trustee. Also, to the same effect is *Barton v. Barton*, 80 Ky. 215.

The fear of counsel that the rule laid down in the *Barkley* case, if adhered to, will lead to fraud and perjury, is without foundation, because that rule is but the repetition of an old rule that has been universally approved, and as yet, the apprehension of counsel has not been realized.

It is clearly established by the proof that it was the fixed purpose of the appellant to give the appellees a thousand dollars each, the three other children having received a thousand dollars each from the appellant's first husband; and she having given five of the appellees two hundred dollars each, five of the notes were executed for eight hundred dollars each, which were intended for said five children, and the remaining two notes were executed for a thousand dollars, which were intended for the two children that had not received anything. It is also clearly proven that the appellant, at the time the notes were executed and assigned to the appellees, clearly and explicitly announced that she would hold said notes for the appellees, saying that if they got possession of them they might dispose of them before the time for their payment. It also clearly appears that she did thereafter hold said notes for the appellees; but it is said that she thereafter erased the assignments, and sued on the notes as her own, and obtained judgment, with the consent of the maker of the notes and the appellees, thereby showing that the gift was unexecuted. But it clearly appears that the appellant, becoming alarmed about the solvency of the maker of the notes, which, if he did, would defeat the substantial realization of the gifts, brought suit on the notes for the benefit of the appellees; and in order to avoid any suspicion of a fraudulent collusion for the benefit of the appellees as children of Henry C. Yager, she erased the assignments and brought suit in her own name. Also, her conduct after obtaining judgment in not claiming interest on these notes, but claiming and collecting interest on the three other notes, on which she, at the same time, had obtained judgment, and only claiming this part of the judgment as belonging to her, but the other part as belonging to the appellees, as well as the interest thereon, shows that she never recalled the gift even if she could, but held it in trust for appellees. But conceding that she, by said act, did undertake to recede from the gift and assert her right to the notes, she could

not do so after having declared a perfect trust in favor of the appellees. The title to the notes by that act passed to them, which the appellant could not thereafter recall without the appellees' consent, which they never gave. But it is said that the appellant, at the time of the gift, was a married woman, consequently she could make no gift. It is true that ordinarily coverture destroys the wife's legal identity, and renders void any contract she may make, and a gift by a married woman being a contract, it is likewise void. But it is equally true that by an antenuptial contract the wife may retain her legal right to contract and dispose of her property as a *feme sole*, and pursuant to this right the appellant and her second husband entered into the following antenuptial contract:—

“That so much of the funds as may be derived from both estates, accruing from rents, interest, or personal effects, shall be for the benefit of both parties; and the said Williamson of the first part agrees that said Louisa of the second part shall have full control of all her estate, to dispose of or manage as she thinks proper; and he further agrees that should he be the longest survivor, he shall turn over to said Louisa's administrator or executor all the remains of her estate, real and personal, that may be in his possession at the time of her decease.”

This agreement certainly reserves to the appellant the power to dispose of her property as a *feme sole*; but the appellant contends that inasmuch as the rents and interest accruing from said property were reserved to the joint use of the husband and the appellant during their joint lives, the appellant could not give the notes away during the life of the husband, for the reason that such gift, carrying the interest and depriving the husband of the joint use of it, would violate the terms of the agreement. It is also said that that part of the agreement that gives the appellant the right to dispose of her property absolutely, being incompatible with that part of it that gives to the husband the right to the joint use of the interest, the right of the appellant, in order to make the agreement consistent, should be construed as reserving to herself the right to dispose of her property by last will, or after the death of her husband only. This restriction would certainly do great violence to the language employed, and would defeat the paramount object that the parties evidently had in view, to wit: That of reserving to the appellant, so far as her property was concerned, the rights of a *feme sole*. Therefore, we

think that the rational construction is that the appellant's right to dispose of her property at any time, as she pleased, was absolutely reserved, and the husband's joint use of the rents and interest "accruing" from this property should be subject to this right of disposal. When it is observed that the husband gave to the appellant the joint use of the rents and interest "accruing" from his property, and when it is remembered that that fact did not in anywise restrict his power of alienating said property—indeed, the contention that it did would be deemed absurd—it is manifest that the appellant was not thus, and should not be, restricted by the agreement.

The judgment is affirmed.

HUSBAND AND WIFE—SEPARATE PROPERTY—CONVEYANCE OF BY WIFE. A married woman can convey her separate property by deed without her husband joining therein, and a contract made by her for the sale of it may be specifically enforced: *Richardson v. De Giverville*, 107 Mo. 422; 23 Am. St. Rep. 426, and note with the cases collected discussing this subject.

CONTRACTS—CONSIDERATION.—Where A. defended the suit of B. upon C's promise to indemnify him against the costs of the defense, this was a good consideration for the promise: *Wells v. Mann*, 45 N. Y. 327; 6 Am. Rep. 93; *Goodspeed v. Fuller*, 46 Me. 141; 71 Am. Dec. 572, and note. The release of an attachment lien is a good consideration for a promise made by a third person to pay the debt for which the attachment was levied: *Smith v. Weed*, 20 Wend. 184; 32 Am. Dec. 525, and note.

ASSIGNMENT WITHOUT DELIVERY.—The assignment of a chose in action must be of the entire debt or obligation, and must be accompanied by a delivery of the note, bond, or other evidence of the debt, if there be one: *Palmer v. Merrill*, 6 Cush. 282; 52 Am. Dec. 782. The delivery of a note is essential to its validity: *Foy v. Blackstone*, 31 Ill. 538; 83 Am. Dec. 246, and note; *Cline v. Guthrie*, 42 Ind. 227; 13 Am. Rep. 357; *Burson v. Huntington*, 21 Mich. 415; 4 Am. Rep. 497, and note; *Purviance v. Jones*, 120 Ind. 162; 16 Am. St. Rep. 319, and note. But see *Kinyon v. Wohlford*, 17 Minn. 239; 10 Am. Rep. 165.

Voluntary Trusts Arising from Declaration of Trustor.

General Principles.—In *Martin v. Funk*, 75 N. Y. 134, 31 Am. Rep. 446, Chief Justice Church remarked that *Milroy v. Lord*, 4 De Gex, F. & J. 264, lays down the general principles governing this branch of law as accurately perhaps as is possible. The following extract from the opinion of Lord Justice Turner in that case is the passage referred to, and may conveniently be taken as the basis of the present note: "I take the law of this court to be well settled that in order to render a voluntary settlement valid and effectual, the settler must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may, of course, do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual, and it

will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds in trust for those purposes; and if the property be personal the trust may, as I apprehend, be declared either in writing or by parol; but in order to render the settlement binding, one or other of these modes must, as I understand the law of this court, be resorted to, for there is no equity in this court to perfect an imperfect gift. The cases I think go further, to this extent, — if the settlement is intended to be effectuated by one of the modes to which I have referred, the court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust." With the above passage it will be useful to compare the following remarks of Sir George Jessel in *Richards v. Delbridge*, L. R. 18 Eq. 11: "The principle is a very simple one. A man may transfer his property, without valuable consideration, in one of two ways, — he may either do such acts as amount in law to a conveyance or assignment of the property, and thus completely divest himself of the legal ownership, in which case the person who by those acts acquires the property, takes it beneficially or on trust as the case may be; or the legal owner of the property may, by one or other of the modes recognized as amounting to a valid declaration of trust, constitute himself a trustee, and without an actual transfer of the legal title, may so deal with the property as to deprive himself of its beneficial ownership, and declare that he will hold it from that time forward on trust for the other person. It is true that he need not use the words, 'I declare myself a trustee,' but he must do something which is equivalent to it, and use expressions which have that meaning; for however anxious the court may be to carry out a man's intention, it is not at liberty to construe words otherwise than according to their proper meaning. . . . The true distinction between gifts and declarations of trust appears to me to be plain and beyond dispute; for a man to make himself a trustee, there must be an expression of an intention to become a trustee, whereas words of present gift show an intention to give over property to another, and not retain it in the donor's hands for any purpose, fiduciary or otherwise."

What Settlements are Voluntary. — Whether a trust is founded upon a consideration or not is usually determined upon the same principles which would be applied in the case of a contract. If a consideration has actually passed it is immaterial whether it proceeds from the beneficiary or not. Thus it is held that a trust declared by an agreement between two persons on valuable consideration for the benefit of a third person may be enforced by such third person, though himself a volunteer, if the agreement amounts to a complete declaration of trust in his favor: *McFadden v. Jenkyns*, 1 Phill. 153; *Crompton v. Vasser*, 19 Ala. 259. So also, if a conveyance for a valuable consideration be made by A to B, and at the same time and as a part of the same transaction B executes a written paper wherein he declares that he purchased the land in trust for C, this constitutes an executed and express trust, and as such it is valid, though C gave no consideration for thus being made a *cestui que trust*. It is immaterial whether the declaration of such use is made on the face of the conveyance itself, or in a separate paper executed by the nominal purchaser of the land at the time of the surrender: *Titchenell v. Jackson*, 26 W. Va. 460. Similarly, where a husband contracts for the purchase of land, and the vendee gives a bond to the wife to make her a title in fee simple on payment of the purchase money, an

enforceable trust is created in her favor: *Wimbish v. Montgomery etc. Ass'n*, 60 Ala. 575. The subject of the consideration of trusts has, however, been generally mooted in connection with two questions which have given rise to much conflict of opinion, and even now are not finally settled: 1. How far will a settlement supported merely by a meritorious consideration be enforced? 2. Does the fact that an incomplete voluntary settlement is created by a sealed instrument entitle the grantee to the assistance of a court of equity?

Meritorious Consideration is that which springs from the natural and moral obligation to provide for and maintain one's wife or offspring: *Landon v. Hutton*, N. J. Ch. March, 1893. In *Hunt v. Johnson*, 44 N. Y. 27, 4 Am. Rep. 631, was upheld a completely executed conveyance of property from husband to wife on the ground that although the gift was void at law, it might be sustained in equity as a declaration of trust in her favor, for which the relationship between the parties furnished a sufficient consideration. But it was remarked that if the agreement had been purely executory there would have been some difficulty in enforcing it. The distinction here made between executed and executory settlements was approved in *Whitaker v. Whitaker*, 52 N. Y. 368, 11 Am. Rep. 711, and has been very generally recognized in other courts of this country, and of England: *Trough's Estate*, 75 Pa. St. 115 (following *Kennedy's Ex'rs v. Ware*, 1 Pa. St. 445; 44 Am. Dec. 145); *In re Campbell's Estate*, 7 Pa. St. 100; 47 Am. Dec. 503; *Egerton v. Carr*, 94 N. C. 648; 55 Am. Rep. 630; *Phillips v. Frye*, 14 Allen, 36; *Taylor v. Staples*, 8 R. I. 170; 5 Am. Rep. 556; *Pinckard v. Pinckard's Heirs*, 23 Ala. 649; *Farborough v. West*, 10 Ga. 471; *Huston v. Markley*, 49 Iowa, 162; *Darley v. Darley*, 3 Atk. 399; *Jefferys v. Jefferys*, 1 Craig & P. 138; *Holloway v. Headington*, 8 Sim. 324; *Dillon v. Coppin*, 4 Mylne & C. 647; *Joyce v. Hutton*, 11 Ir. Ch. 123; *Moore v. Crofton*, 3 Jones & L. 442. In other cases, of which *Jones v. Obenchain*, 10 Gratt. 259; *Woodson v. McClelland*, 4 Mo. 495; *Bunn v. Winthrop*, 1 Johns. Ch. 329, are examples, the settlement was executed, and the point under discussion was not raised. The strongest authority for the view that the existence of a meritorious consideration will entitle the grantee to the aid of a court of equity, whether the settlement be executed or executory, is *Ellis v. Nimmo*, Lloyd & G. 333, in which the subject was exhaustively reviewed by Lord Chancellor Sugden. That eminent jurist, after a careful consideration of the authorities, enforced against the settler a postnuptial agreement by which a father had undertaken to make a provision for his child. He rested his decision mainly upon the cases in which equity interposes in aid of the defective execution of a power or surrender of a copyhold, which do not arise out of contract, but depend upon an intention to settle. In *Moore v. Crofton*, 3 Jones & L. 442, Lord Chancellor Sugden admitted that this decision had been rendered in opposition to the general opinion of the legal profession, but at the same time declared that he still thought it a correct statement of the law. In England *Ellis v. Nimmo*, Lloyd & G. 333, is generally regarded as having been overruled by *Holloway v. Headington*, 8 Sim. 324; *Dillon v. Coppin*, 4 Mylne & C. 647; *Jefferys v. Jefferys*, 1 Craig & P. 138; and although the American editor of White's Lead. Cas. Eq. has pointed out that the decision of those cases did not really require a direct repudiation of the ruling in *Ellis v. Nimmo*, the language used by the judges shows very clearly that they did not regard it as a sound authority. In this country the doctrine of *Ellis v. Nimmo* has found some support. It seems to have been adopted without reserve in Kentucky: *Buford's Heirs v. McKee*, 1 Dana, 108; *Mahan v. Mahan*, 7 B. Mon.

579; *Bright v. Bright*, 8 B. Mon. 194; *McIntire v. Hughes*, 4 Bibb, 186; *Cotton v. Graham*, 84 Ky. 672. In *Jones v. Jones*, 6 Conn. 111, 16 Am. Dec. 35, a voluntary settlement made on wife and children, with the intention that the deed should not be delivered until after the settler's death was enforced upon the authority of the old cases of *Randall v. Randall*, 2 P. Wms. 467; *Holt v. Frederick*, 2 P. Wms. 357; *Ex parte Barnsley*, 3 Atk. 185; *Beard v. Nuthall*, 1 Vern. 427; *Clavering v. Clavering*, 2 Vern. 473; but, although the distinction between executed and executory settlements was plainly involved in this decision, it was not adverted to by the court. In *Wimbish v. Montgomery etc. Ass'n*, 69 Ala. 575, the language of the court is broad enough to comprehend executory settlements, but as the main authority cited is *Dennison v. Goehring*, 7 Pa. St. 175, 47 Am. Dec. 505, which certainly does not sustain the bare proposition that such settlements are always enforceable, it is doubtful whether the doctrine of *Ellis v. Nimmo*, was accepted in Alabama. On the whole, then, it would seem that in England *Ellis v. Nimmo*, has been tacitly, if not directly, overruled, and that outside of Kentucky and Alabama, it has not been countenanced in any American case in which the question has been fairly presented.

In *Whitaker v. Whitaker*, 52 N. Y. 368, 11 Am. Rep. 711, in which it was sought to sustain a promissory note given by a husband to his wife as against his collateral heirs, Justice Peckham, after giving a succinct summary of the authorities for and against the doctrine of *Ellis v. Nimmo*, pronounced a decisive opinion against its soundness, and the earlier case of *Hayes v. Kershow*, 1 Sand. Ch. 258, to the contrary effect, must now be regarded as no longer law in New York. The learned judge thus endeavors to show that the true policy of the law is to avoid giving life in equity to this sort of last will. "It is a method most open to fraud. Although a will requires two witnesses, a note requires none. It requires no great skill so to counterfeit a man's signature as to find witnesses to believe in its genuineness; and a little strength is then added by what is well regarded as the weakest evidence,—oral confession of the deceased. While a man lives, a legal obligation rests upon him to sustain his wife and children. When he dies, the law declares what is the proper share of his property, the legal and equitable share which belongs to them. If either claim more, the claim should be founded in the law. If it do not allow enough, it may safely be enlarged by statute." It is difficult to see that there is any less danger of fraud where the beneficiary in an explicit declaration of trust is claiming under an unwitnessed writing found among the grantor's papers after his death, than under a writing like a promissory note which is made the basis of a claim under similar circumstances. Undoubtedly the unwillingness of the courts to countervene the policy of the statute of wills is the main reason why imperfect gifts and voluntary executory trusts are not enforced, for it is almost invariably the case that the aid of equity to complete such transactions is sought after the grantor's death. But arguments like those of the learned judge would, if pushed to their logical conclusion, point to the necessity of refusing to enforce many declarations of trust which it is now deemed proper to carry into effect.

The most recent case in which the question of meritorious consideration has been considered is *Landon v. Hutton*, N. J. Ch. Feb. 1893. The chancellor held that an incomplete trust for the benefit of a child could not be enforced unless it was induced by "the single and well-defined intention to execute the natural parental duty to support and maintain, partially carried into effect, which cannot be defeated without obvious injustice," and

drew a distinction between such a case and one where "a parent, of his mere pleasure, would bestow a gift upon a child, or where he would bestow it to possibly obtain a benefit for himself." This subtle distinction seems to have been due in great measure to a desire to avoid running counter to some previous decisions of the court, in which an equity founded on meritorious consideration had been recognized, but it involves the double disadvantage of introducing a new complication into an obscure subject, and of creating a rule extremely difficult of application in practice. The doctrine which places voluntary settlements for the benefit of wife and children on the same level as similar settlements for strangers, and the doctrine which makes a meritorious consideration as efficacious as one that is valuable, are both simple and intelligible. But a doctrine that would throw upon the court the task of deciding whether the grantor had been influenced strictly by the desire to make a provision for the beneficiaries or had acted "out of mere bounty," or with a view to his "possible future advantage," is altogether too vague to be satisfactory. Whatever indulgence may have been granted to this kind of settlement has always been strictly confined to the relationship of husband and wife, or parent and child. Equity will not perfect an incomplete conveyance in favor of a natural son: *Fursaker v. Robinson*, Prec. Ch. 475; or a brother: *Reed v. Vannordale*, 2 Leigh, 569; or sister: *Hayes v. Kershaw*, 1 Sand. Ch. 258; or nephew: *Buford's Heirs v. McKee*, 1 Dana, 107; or a niece: *Edwards v. Jones*, 1 Mylne & C. 226; or a son-in-law: *Meek v. Kettlewell*, 1 Hare, 464; *Darlington v. McCool*, 1 Leigh, 36. Nor will the consideration of marriage operate to support limitations in a marriage settlement in favor of a collateral relation: *Stackpole v. Stackpole*, 4 Dru. & War. 320; *Johnson v. Legard*, 3 Madd. 283; *Cotterell v. Homer*, 13 Sim. 506; *Wollaston v. Tribe*, L. R. 9 Eq. 44; *Godsal v. Webb*, 2 Keen, 99. In the last case the ultimate limitations in a marriage settlement provided that the interest on proceeds of a policy of insurance which the wife's trustees were to effect upon her life, should be paid to her husband, during his life, if he survived her, then to such persons as she should by will appoint; and in default of such appointment, to the persons entitled under the statute of distribution. The wife survived, and being unwilling to keep up the premiums, procured an assignment to her cousin, by whom the premiums were paid, until the death of the assignor. The assignment was held valid, the trust in favor of the next of kin in the settlement being declared incomplete and executory, and, as they were volunteers, not enforceable. The same rule prevails in regard to a settlement made in favor of the children of a future marriage: *Wollaston v. Tribe*, L. R. 9 Eq. 44. In this connection, however, it may be noticed that a settlement voluntary in its creation will cease to be voluntary if a person is induced to marry the grantee on account of such provision: *Sugden's Vendors and Purchasers*, 437; *Brown v. Carter*, 5 Vea. 862; *Doe v. Manning*, 9 East, 69; *Sterry v. Arden*, 1 Johns. Ch. 261; *Verplank v. Sterry*, 12 Johns. 536; 7 Am. Dec. 348; *Guardian Ass. Co. v. Avonmore*, 6 Ir. Rep. Eq. 391.

Voluntary Settlements Under Seal.—Mr. Pomeroy in his work on the Specific Performance of Contracts states that, "in a few of the early cases, before the jurisdiction of equity was clearly settled, it was held that voluntary agreements, if under seal, should be enforced," and cites *Beard v. Nuthall*, 1 Vern. 427; *Wiseman v. Roper*, 1 Ch. Cas. Ch. 84; *Tyrrell v. Hope*, 2 Atk. 502; *Edwards v. Countess of Warwick*, 2 P. Wms. 176; *Husband v. Pollard*, cited in 2 P. Wms. 467. But these decisions and dicta have long since been overruled, and it is now a well-established doctrine that the rule that equity

will refuse to execute a voluntary contract to create a trust admits of no exception in the case of agreements under seal. "I have no doubt," said Lord Chancellor Cottenham in *Jefferys v. Jefferys*, Craig & P. 141, "that the court will not execute a voluntary contract, a covenant, or a settlement." To the same effect see *Wycherley v. Wycherley*, 2 Eden, 177; *Fursaker v. Robinson*, Prec. Ch. 475; *Peacock v. Monk*, 1 Ves. Sr. 127; *Underwood v. Hitchcock*, 1 Ves. Sr. 279; *Williamson v. Codrington*, 1 Ves. Sr. 514; *Stapilton v. Stapilton*, 1 Atk. 10; *Harvey v. Audland*, 14 Sim. 531; *Meek v. Kettlewell*, 1 Phill. 342; 1 Hare, 464; *Edwards v. Jones*, 1 Mylne & C. 226; *Fletcher v. Fletcher*, 4 Hare, 74; *Jones v. Lock*, L. R. 1 Ch. 25; *Kekewich v. Manning*, 1 De Gex M. & G. 176.

Some of the American cases attach rather more importance to the presence of a seal. But this conflict of authority is perhaps rather apparent than real, and it may be doubted whether, in spite of some very general expressions of the judges on this subject, there is any direct decision by an American court holding that a purely executory and voluntary settlement will be enforced solely on the ground that it is under seal. In all these cases it will, we think, be found that the settlement was supported by a meritorious consideration, and that the opinion of the court was formed as much with reference to this fact as to the presence of the seal. See *McIntire v. Hughes*, 4 Bibb, 186; *Mahan v. Mahan*, 7 B. Mon. 579; *Bright v. Bright*, 8 B. Mon. 194; *Reed v. Vannordale*, 2 Leigh, 569; *Caldwell v. Williams*, 1 Bail. Eq. 175; *Hayes v. Kershaw*, 1 Sand. Ch. 258, and the remarks in Chief Justice Gibson's opinion in *Dennison v. Gochring*, 7 Pa. St. 175, 47 Am. Dec. 505. This passage is relied on as one of those which countenance the doctrine that the fact of an instrument's being under seal entitles it to special favor in equity; but the cautious remarks of the learned chief justice do not justify any such inference. Indeed, he seems to have actually repudiated that doctrine in another part of his opinion: "But, is it true," he asks, "that equity will not enforce an executory trust in favor of a volunteer? It will doubtless not enforce a contract to create a trust, though it were under hand and seal; and in this respect it carries the doctrine of *nudum pactum* further than the law does; but the difference between a covenant to create a trust and a trust created is as great as the difference between a contract to convey and a conveyance executed. It enforces no contract which does not rest on a valuable, or at least a meritorious, consideration, but it enforces an executed contract with as much alacrity as the law would enforce it. The reason of the difference in regard to the seal is, that the interposition of a chancellor is matter of favor; but that the interposition of a court of law, with whom a seal stands for consideration, is matter of right." *Bunn v. Winthrop*, 1 Johns. Ch. 329, is sometimes referred to as sustaining the general proposition that the presence of a seal will entitle the beneficiary to have a voluntary settlement of chattel interests, though not of land, enforced, whether it is executory or executed. The language of Chancellor Kent in that case is undoubtedly broad enough, if taken literally, to comprehend such a doctrine; but, as was pointed out by Justice Sharswood in *Pringle v. Pringle*, 59 Pa. St. 281, the deed which the court was asked to enforce had been fully executed, and the only point really at issue was whether the retention of the instrument rendered it incapable of enforcement.

On the other hand, in *Stone v. King*, 7 R. I. 358, 84 Am. Dec. 557, and *Pringle v. Pringle*, 59 Pa. St. 281, the English doctrine is recognized as correct, for in both the court assumed that the efficacy to be ascribed to a seal

in a court of equity depends upon whether the agreement is executed or executory. In the former case it was declared that "if the deed under which volunteers are claiming be inoperative at law, they cannot have the aid of a court of equity to complete and perfect it, any more than they can have the aid of the court to enforce a promise, or even covenant, without consideration." In the latter case, the reason for the distinction between executory and executed trusts under seal is clearly stated: "The seal does not produce the effect [of estoppel] until the instrument becomes the deed of the party by delivery, or what is equivalent thereto. Until then the assignment, though signed and sealed, is still an unexecuted transfer in the eye of the law." From this review of the American cases it will be seen that there is no direct authority against the rule so often reiterated by the English judges, that an agreement under seal will not be enforced in equity merely because it is under seal, and apart from other considerations, and that at least two courts have recognized its soundness. Perhaps, therefore, it may fairly be anticipated that whenever the point is directly presented, the courts will hereafter follow the lead of *Stone v. King* and *Pringle v. Pringle*.

Formal Requisites of Instruments Creating Voluntary Settlements.—The statute of frauds covers voluntary trusts as well as those created upon a valuable consideration. Thus a voluntary trust of personalty is valid, though created by parol: *Dipple v. Corles*, 11 Hare, 183; *Chase v. Perley*, 148 Mass. 289; *Thomas v. Merry*, 113 Ind. 83; *Peckham v. Taylor*, 81 Beav. 250. If such a parol trust has been executed, no possible question can arise as to its validity: *Stringer v. Montgomery*, 111 Ind. 489; but "if the case be one of doubt or difficulty upon the words which are supposed to have been used, the court will give weight to the consideration that the words, not being committed to writing in any definite and unquestionable form, may not be the deliberately expressed purpose of the party": *Dipple v. Corles*, 11 Hare, 183. On the other hand, a declaration of trust in land must be in writing, and signed by the beneficial owner: *Tierney v. Wood*, 19 Beav. 330; *Kronheim v. Johnson*, L. R. 7 Ch. Div. 60. In some jurisdictions such a declaration must also be under seal: *Pittmann v. Pittmann*, 107 N. C. 159. The verified answer in an action which contains a declaration of the defendant that the real property was conveyed to him in trust for certain purposes, is a sufficient declaration in writing to satisfy the statute: *Garnsey v. Gothard*, 90 Cal. 603. A deed of settlement will not be invalidated by the fact that the limitations in the conveyance are expressed to be to the "trustees, executors, administrators, and assigns," omitting the word "heirs": *Delrow v. Bone*, 3 Giff. 538; nor by a mere misdescription of the land which is the subject of the settlement: *Lynn v. Lynn*, 135 Ill. 18; but where the instrument leaves it uncertain who are intended to be the objects of the grantor's bounty, the settlement cannot be upheld either as a gift or a declaration of trust: *Roberts v. Roberts*, 11 Jur., N. S., 992; 12 Jur., N. S., 971; *Sheedy v. Roach*, 124 Mass. 472; 26 Am. Rep. 680.

Language Necessary to Create a Trust.—There is a complete unanimity in the cases as to the principle that, "If the declaration of a trust be in writing, it is not essential as a general rule that it should be in any particular form. It may be couched in any language which is sufficiently expressive of the intention to create a trust. . . . The intention must be a complete one, and this requisite is especially applicable to trusts created by voluntary dispositions": *Estate of Smith*, 144 Pa. St. 428; 27 Am. St. Rep. 641. The limitation of this rule to written declarations, however, does not seem to be necessary. Thus in *Gadsden v. Whaley*, 14 S. C. 210, it was said to be

enough, if the settler, either orally or in writing, explicitly or impliedly, declares that he holds *in presenti* for another. This, it is presumed, is the proper way of stating the rule, subject of course, to the requirements of the statute of frauds. See, generally, as to this point: Flint on Trusts and Trustees, sec. 34; Perry on Trusts, sec. 82. It is not necessary that the instrument creating the trust should contain the words "confidence," "trust," or "trustee," provided the language used expresses the intention that one party shall hold the legal title, and another the beneficial interest: *Kekewich v. Manning*, 1 De Gex, M. & G. 176; *Richards v. Delbridge*, L. R. 18 Eq. 11-13; *Heartley v. Nicholson*, L. R. 19 Eq. 233; *Ex parte Pye*, 18 Ves. 140; *Wheatley v. Parr*, 1 Keen, 551; *McFadden v. Jenkyns*, 1 Hare, 458; 1 Phill. Eq. 153; *Paterson v. Murphy*, 11 Hare, 88; *Gerrish v. New Bedford San. Inst.*, 128 Mass. 159; 35 Am. Rep. 365; *Luco v. De Toro*, 91 Cal. 406. Loose and vague declarations as to a person's intentions in holding property in trust for other members of his family are not sufficient to charge him with a trust by implication: *Dipple v. Corles*, 11 Hare, 183; *Cowan v. Wheeler*, 25 Me. 267; 43 Am. Dec. 283; following *Steere v. Steere*, 5 Johns. Ch. 1; 9 Am. Dec. 256. The creation of a voluntary trust may also be established by circumstances which show beyond a reasonable doubt that there was an intention that it should be created: *Beaver v. Beaver*, 117 N. Y. 421; 15 Am. St. Rep. 531; *Connecticut Riv. Sav. Bank v. Albee's Estate*, 64 Vt. 471; 33 Am. St. Rep. 944; and the principal case. "The result of the decisions is that the court looks into the nature of the transaction and determines, from its nature, what shall be the effect of it in divesting the owner of the property to which it relates": *Hughes v. Stubbs*, 1 Hare, 476.

An Imperfect Voluntary Trust will not be Enforced in Equity.—This rule, which is expressly or impliedly recognized in all the cases relating to the subject, is an application of the more general principle that equity will lend no assistance towards perfecting a mere voluntary contract while it remains *in fieri*: *Willan v. Willan*, 16 Ves. 82; *Antrobus v. Smith*, 12 Ves. 46. For a discussion of this general principle, see the note to *Anderson v. Green*, 23 Am. Dec. 417-431. Hence, whether a gift or a trust is intended, if the transaction still remains imperfect and executory, equity will not aid its enforcement: *Estate of Smith*, 144 Pa. St. 428; 27 Am. St. Rep. 641. "The ordinary power of a chancellor extends no farther than the execution of a trust sufficiently framed to put the title out of the grantor, or to the execution of an agreement for a trust founded on a valuable consideration": *Read v. Robinson*, 6 Watts & S. 338, per Gibson, C. J. The cases in which the court refuses relief are those in which, "from the imperfect declaration, a trust is not fully created, and the beneficiaries are compelled to come into court to have the trust perfected": *Tanner v. Skinner*, 11 Bush, 120. Under such circumstances the parties are left to their remedies at law: *Carlhart's Appeal*, 78 Pa. St. 100. See further, to the same effect, 2 Bla. Com. 441; Pomeroy's Equity Jurisprudence, sec. 997; Flint on Trusts, sec. 43, and the following cases, which have been selected for the reason that they contain a plain and unqualified statement of the rule: *Wycherley v. Wycherley*, 2 Eden, 177; *Brownsmith v. Gilbourne*, 2 Strange, 739; *Morris v. Burroughs*, 1 Atk. 401; *Woodford v. Charnley*, 28 Beav. 96; *Weale v. Ollive*, 17 Beav. 252; *Milroy v. Lord*, 4 De Gex, F. & J. 264; *Ellison v. Ellison*, 6 Ves. 656; *Pulvertoft v. Pulvertoft*, 18 Ves. 99; *Lechmers v. Cartledge*, 3 P. Wms. 222; *Collinson v. Patrick*, 2 Keen, 123; *Kekewich v. Manning*, 1 De Gex, M. & G. 176; *Fletcher v. Fletcher*, 4 Hare, 74; *Uniacke v. Giles*, 2 Molloy, 25; *Attorney-general v. Whorwood*, 1 Ves. 535; *Denning v. Ware*, 22 Beav. 184;

Scales v. Maule, 6 De Gex, M. & G. 43; *Stons v. Hackett*, 12 Gray, 227; *Bunn v. Winthrop*, 1 Johns. Ch. 329; *Pingrey v. National Ins. Co.*, 144 Mass. 374; *Adams v. Adams*, 21 Wall. 185; *Acker v. Phoenix*, 4 Paige, 305; *Minturn v. Seymour*, 4 Johns. Ch. 498; *Estate of Webb*, 49 Cal. 541; *Clarke v. Lott*, 11 Ill. 105; *Badgley v. Potrain*, 68 Ill. 25; 18 Am. Rep. 541; *Massey v. Huntington*, 118 Ill. 80; *Lynn v. Lynn*, 135 Ill. 19; *Barnum v. Reed*, 136 Ill. 389; *Owens v. Owens*, 23 N. J. Eq. 60; *Lane v. Ewing*, 31 Mo. 75; 77 Am. Dec. 632; *Carhart's Appeal*, 78 Pa. St. 100; *Kennedy v. Ware*, 1 Pa. St. 445; 44 Am. Dec. 145; *Landon v. Hutton*, N. J. Ch., Feb., 1893; *Leeper v. Taylor*, 111 Mo. 312; *Wimbish v. Montgomery etc. Ass'n*, 69 Ala. 575; *Stone v. King*, 7 R. L. 358; 84 Am. Dec. 557; *Wittingham v. Lighthipe*, 46 N. J. Eq. 429.

The leading English case upon this subject is *Ellison v. Ellison*, 6 Ves. 656, in which Lord Eldon said: "I take the distinction to be that if you want the assistance of the court to constitute you *cestui que trust*, and the instrument is voluntary, you shall not have that assistance for the purpose of constituting you *cestui que trust*, as upon a covenant to transfer stock, etc., if it rests in covenant, and is purely voluntary, the court will not execute that voluntary covenant; but if the party has completely transferred stock, etc., though it is voluntary, yet the legal conveyance, being effectually made, the equitable interest will be enforced by the court." In that case, a settlement was upheld, although by a subsequent conveyance the legal estate became vested again in the settler, and although the power of revocation by complying with certain formalities in the execution of the revoking instrument had been expressly reserved. The chancellor declared that the former circumstance could not change the rights of the parties when the trust had once been perfected (to the same effect see *Browne v. Cavendish*, 1 Jones & L. 637), and that the provision as to revocation was to be strictly construed, so as to deprive the settler of the power of revoking the trust in any other manner than the one specified by himself.

In *Stone v. Hackett*, 12 Gray, 227, Judge Bigelow cited approvingly the above case, and gave the following lucid exposition of the rule: "The key to the solution of this question raised in this case is to be found in the equitable principle, now well established and uniformly acted upon by courts of chancery, that a voluntary gift or conveyance of property in trust, when fully completed and executed, will be enforced and carried into effect against all persons except creditors or *bona fide* purchasers without notice. It is certainly true that a court of equity will lend no assistance towards perfecting a voluntary contract or agreement for the creation of a trust, nor regard it as binding so long as it remains executory; but it is equally true that if such an agreement or contract be executed by a conveyance of property in trust, so that nothing remains to be done by the grantor or donor to complete the transfer of title, the relation of trustee and *cestui que trust* is deemed to be established, and the equitable rights and interests arising out of the conveyance, though made without consideration, will be enforced." It was accordingly held that a delivery, without consideration, of shares in a corporation, with blank assignments indorsed thereon, upon trust to pay the income to the settler for life, and, at his death, to transfer the shares to certain charities, is valid, and will be upheld in equity against the settler's widow, claiming the share which the law allows her in property of which he died possessed. As in *Ellison v. Ellison*, the settler had reserved a power of revocation; but this circumstance was pronounced immaterial, inasmuch as the power had not been exercised. "A power of revocation," said the court, "is perfectly consistent with the creation of a valid trust.

It does not in any degree affect the legal title to the property. That passes to the donee, and remains vested for the purposes of the trust, notwithstanding the existence of a right to revoke it."

Trusts Partly Executed and Partly Executory. — The rights arising where the trust is partly executed and partly executory are well shown by the recent case of *Garner v. Germania Life Ins. Co.*, 110 N. Y. 267. There L. had taken out a policy of insurance upon his life, the application being made by him expressly as trustee for his three children, and the policy describing the premium as paid by him "in trust for his children." The premium for 1878 was not paid when due; but four days afterwards L. surrendered the policy to the company, and took out a new one for the same amount, and calling for the same annual premium, which was made payable to the second wife. There was no new examination of L., and the new policy bore the same number as the one canceled, and stated the age of L. as thirty-nine "in 1863." The first premium was paid in part by a dividend earned by the earlier policy, and the new policy acknowledged the receipt by defendant of the premium and fourteen hundred and twenty-nine dollars and forty-four cents, "to be paid on delivery of the policy." That amount was paid by the cancellation of the old policy and the transfer of its surrender value to defendant in reduction of the annual premiums. It was held that after notifying the beneficiaries of the trust, and acting upon it until it had become valuable to them, L. had no right to end it without notice to them; that the beneficiaries had a vested interest in the policy at the time of its surrender, measured and represented by its surrender value, which L. could not deal with in contravention of their rights; and that the original policy did not lapse, the failure to pay the premium in 1878 having been waived by defendant by issuing the new policy, which was, in effect, a continuation of the original. In answer to a contention made by counsel that the trust was so far executory as to be capable of revocation, Justice Finch said: "I think it is a mistake to assume that the trust was wholly executory. It had been to a large extent executed. Every payment of premium for fifteen years had steadily added to the value of the policy as the property of the beneficiaries. The day of final payment grew nearer and nearer, and the burden of premiums decreased steadily in number. Each payment made added to the surrender value, and fully executed the gift to the extent of the value. What the assured had done for the benefit of the assured he could not undo without their assent, nor take from them what was already theirs."

Foundation of the Doctrine as to Executed and Executory Trusts. — In *McFadden v. Jenkyns*, 1 Hare, 458, Vice-Chancellor Wigram thus attempted to account for the attitude of courts of equity in regard to this class of cases: "There may be difficulty in reconciling with each other all the cases. Perhaps they are to be reconciled and explained upon the principle, that a declaration of trust purports to be, and is in form and substance, a complete transaction, and the court need not look beyond the declaration of trust itself, or inquire into its origin in order that it may be in a position to uphold and enforce it; whereas an agreement or attempt to assign is in form and nature incomplete, and the origin of the transaction must be inquired into by the court; and where there is no consideration, the court upon its general principles cannot complete what it finds imperfect." Another passage which throws considerable light upon the principles which underlie the cases is the following from *Fletcher v. Fletcher*, 4 Hare, 74: "A court of equity will not, in favor of a volunteer, give to a deed any effect beyond what the law will

give to it. But if the author of the deed has subjected himself to a liability at law, and the legal liability comes to be regularly enforced in equity (as in the case of a volunteer claiming payment out of assets, and of one claiming under a voluntary trust, where a fund has been transferred), the observation that the claimant is a volunteer is of no value, in favor of those who represent the author of the deed." This passage, taken literally, does not cover those cases in which the legal owner constitutes himself a trustee by an explicit declaration that he holds the legal title for another. Here there is no liability at law, but, as will be shown hereafter, the rights of the beneficiary in such a case are protected as readily as where a conveyance of the legal title is made to trustees for his benefit. Possibly the true explanation of the matter may be merely that a court of equity concerns itself, primarily and before all things with the beneficial interest, and secondarily with the legal title only so far as the ownership of the beneficial interest cannot be determined without inquiring in whom the legal title is vested. If, therefore, one who is the full owner of property has undertaken to divest himself of the legal title, with or without the beneficial interest, equity will not take cognizance of the transaction unless legal requisites are satisfied by the conveyance. To this extent equity "follows the law." But if he undertakes to divest himself of the beneficial interest only, it is plain that a court of equity is the proper, and indeed the only possible tribunal by which the rights of the parties can be defined and established.

What is Necessary to Render a Settlement Complete. — "Some confusion has been created by judicial expressions that the author of such a trust must do all in his power to carry out his intention that the nature of the property will admit of. This general proposition requires some qualification. In this case the intestate might have notified the objects of her bounty, but this is not regarded as indispensable by any of the authorities. The rule does not require that the gift shall be made in any particular way; it only requires that enough shall be done to transfer the title to the property, and one of the modes of doing this is by an unequivocal declaration of trust": *Martin v. Funt*, 75 N. Y. 134; 31 Am. Rep. 446. In support of this statement of the rule, the following passage from *Richardson v. Richardson*, L. R. 3 Eq. 684, was then cited: "Reliance is often placed on the circumstance that the assignor has done all he can, and that there is nothing remaining for him to do, and it is contended that he must in that case only be taken to have made a complete and effectual assignment. But that is not the sound doctrine on which the case rests, for if there be an actual declaration of trust, although the assignor has not done all that he could do; for example, although he has not given notice to the assignee, yet the interest is held to have effectually passed, as between the donor and donee. The difference must be rested on this: Aye or no, has he constituted himself a trustee?" A more correct statement of the rule, therefore, would be, that the court will not regard the beneficial interest as having passed to the *cestui que trust* unless the donor has done everything which the law requires him to do in order to divest himself of that beneficial interest. That is plainly not the same thing as requiring him to do all that he can do. "The question," said the court in *Cunningham v. Plunkett*, 2 Younge & C. 245, "is whether everything that was necessary was done to complete the transfer in the lifetime of the settler." So in *Walker v. Orwe*, it was said that "the true sense of the principle is, that the dominion over the thing given shall be parted with, not that the technical right to maintain an action shall be conferred." And in *Fletcher v. Fletcher*, 4 Hare, 74, the court emphatically declared that it was "an extra-

ordinary proposition that nothing being wanted to perfect the liability of the estate to pay the debt, the plaintiff has no right in equity to obtain the benefit of the trust." In short, all that is required is that the intention to divest himself of the beneficial interest in the property should be consummated. Whether a divestiture of the legal interest is also required depends upon the form of the settlement adopted by the donor.

It is obvious that a transfer of the beneficial interest may take place under three different sets of facts: 1. The donor may be both the legal and equitable owner of the property, and convey the legal title to other persons, to hold it for the benefit of the intended *cestui que trust*, who may be the donor himself; 2. The donor, being the full owner of the property, as in the first case, may retain the legal title himself, and convey the equitable title direct to the intended *cestui que trust*; 3. The legal interest may be outstanding in trustees for the benefit of the donor himself, and he may then transfer his equitable interest to the intended *cestui que trust* by giving a sufficiently explicit direction to the trustees for that purpose. These three cases will now be considered separately.

Declaration of Trust by Conveyance of Property to Trustees. — The rule for this case cannot be more clearly stated than in the words of the head note to *Bentley v. Mackay*, 15 Beav. 12: "The court, in order to give effect to voluntary settlements, requires, where the settler is the legal owner, everything to have been done which is requisite to transfer the legal ownership. The court will not inquire what the trusts are until there has been a change of legal ownership, and so a trust has been constituted:" *Scales v. Maude*, 6 De Gex, M. & G. 43; *Walrond v. Walrond*, 4 Jur. 1099; *Landon v. Hutson*, N. J. Ch., Feb., 1893, citing with approval *Perry on Trusts*, sec. 100, and *Lewin on Trusts*, page 69. See also *Pomeroy's Equity Jurisprudence*, sec. 998. Hence it is not enough for the donor to execute a paper purporting to pass the legal title, if in fact it does not have that effect: *Barnum v. Reed*, 136 Ill. 389. If the settlement is complete in itself, and effectual to pass the title, it will not be invalidated by the fact that the settler also covenants to perfect all assignments and transfers, and do all necessary acts where they had not been done, and declares that, until such full and complete transfer and vesting could be effected, he should stand possessed thereof upon the trusts declared in the deed of settlement: *Donaldson v. Donaldson*, 1 Kay, 711; 1 Jur., N. S., 10. Compare as to this point, *Sewell v. King*, L. R. 14 Ch. 179, an instructive case, and *Lane v. Ewing*, 31 Mo. 75; 77 Am. Dec. 632. Nor will an assignment of consols and cash in bank to trustees for the benefit of the settler's daughters be deemed incomplete merely because, after the decease of the settler two weeks later, the consols stood in his own name, and the balance at his bankers amounted to more than the sum mentioned by him: *Avrey v. Hall*, 3 Smale & G. 315. With the doctrine of this case should be contrasted the rule referred to hereafter, that, where certain formalities are required for the complete transfer of stock or shares in a company, the transfer is not complete until the prescribed entries are made upon the books of such company. Delivery of property to A, with directions to hold it in trust for B: *Sherwood v. Andrews*, 2 Allen, 79; *Wheatley v. Purr*, 1 Keen, 551; or with directions to hand it over to B: *Wyble v. McPheters*, 52 Ind. 393, creates a complete and enforceable trust in favor of B. A trust is none the less complete, if properly created, because the time for the actual enjoyment of the property granted is deferred till after the donor's death. Thus in *Egerton v. Carr*, 94 N. C. 648, 55 Am. Rep. 630, a present equitable interest was held to vest under instrument in these terms:

"The following notes I leave in trust with my son-in-law, E. C., to be equally divided between my daughters (naming them) after my death." (As to this point, see further under the subdivision relating to papers of a testamentary character.) A complete and irrevocable trust is also created by an agreement, under which a person entitled to the estate of a decedent consents that another person shall take out letters of administration and invest the property for the benefit of others: *Oressman's Appeal*, 42 Pa. St. 147; 82 Am. Dec. 498; by a document running thus: "Received of H for the use of C one hundred pounds to be paid to her at H's death, but the interest, at four per cent to be paid to A," and also indorsed with the written approval of A: *Moore v. Darton*, 4 De Gex & S. 517; and by a mortgage executed as a security for the payment of certain sums annually by the mortgagor to the mortgagee: *McPherson v. Rollins*, 107 N. Y. 316; 1 Am. St. Rep. 826. In *Jackson v. Twenty-Third St. R'y Co.*, 88 N. Y. 520, it was held under the following circumstances that the donor intended to make one a trustee for a third person and not to make him the full owner of the property transferred. S purchased and paid for thirty shares of defendant's stock, directing the treasurer at the time to set it aside in the name of Y, plaintiff's testator, and stating that he would let him know whether to deliver it to Y and what to do with it at some future time. The treasurer issued a receipt stating that he had received the purchase money from Y, who had married the niece of S, and had adopted a child in whom S took a special interest. Afterwards S told Y that he could make the shares but twenty-seven, and, as the receipt had been made out to him, would want an order for the three shares, which was thereupon given by Y. No certificate of the stock was ever issued. When a dividend had been declared thereon, S directed Y to go to the office for it, saying that he had had the dividends made out in his name, and they would support or help support the child, and the dividends were paid to Y by the direction of S till the death of Y. The court said: "The intent is a necessary element of the transaction. Delivery without intent to vest the title in the donee, could pass no title in him. It may be admitted that the payment of the money by S, the entry of the stock on the books of the company in the name of Y, and the delivery to him of the treasurer's receipt, would have been sufficient to constitute a delivery of the stock to Y, and sufficient to make a valid gift thereof to him, but it is clear that such was not the intention." A necessary result of the complete execution of the trust is that the representatives of the donee are entitled to the property settled, if the donee dies in the lifetime of the grantor: *Peck v. Parrot*, 1 Ves. Sr. 236.

Declaration of Trust, where Settler Constitutes Himself Trustee. — "A declaration of trust is considered in a court of equity as equivalent to a transfer of the legal interest in a court of law; and if the transaction is complete, it will not be disturbed for want of consideration": *Collinson v. Patrick*, 2 Keen, 123. The simple principle here stated fully explains the position assumed by courts of equity in regard to transactions of this description. In practice the difficulty has been to distinguish them from attempts to make a gift: *Jones v. Lock*, L. R. 1 Ch. 25. As was observed in *Beach v. Keep*, 18 Beav. 285, "the distinction between an assignment for the benefit of a volunteer, and a declaration of trust, though very thin, pervades all the cases." It makes a great difference on which side of this ill-defined line the circumstances of any given case are finally determined to lie.

Enforcement of Declarations of Trust in Another's Favor, Generally. — A trust differs essentially from a contract, and will be enforced when a contract

cannot: *Crawford's Appeal*, 61 Pa. St. 52; 100 Am. Dec. 609. The essential difference is that "where there is a declaration of trust it will be enforced, whether there is a consideration or not": *Jones v. Lock*, 1 L. R. Eq. 25, per Lord Cranworth. Compare *Steele v. Waller*, 28 Beav. 466, and *Tanner v. Skinner*, 11 Bush, 120, in which the statement of the general rule in Perry on Trusts, sec. 96, is cited with approval. This mode of investing another with the beneficial interest in property does not require a transfer of the legal title: *Leeper v. Taylor*, 111 Mo. 312. All that is necessary is that the donor or grantor should have absolutely parted with his interest and have effectually put such interest beyond his reach: *Warriner v. Rogers*, 16 L. R. Eq. 340; *Lane v. Ewing*, 31 Mo. 75; 77 Am. Dec. 632. The declaration must be unequivocal: *Landon v. Hutton*, N. J. Ch., Feb., 1893; *Connecticut Riv. Sav. Bank v. Albee*, 64 Vt. 571; 33 Am. St. Rep. 944.

Intention of Donor, How Far Controlling. — A clear expression of intention to hold property in trust for others is necessary before the court can hold that a party intended to subject himself to all the consequences of a declaration of trust: *Dipple v. Corles*, 11 Hare, 183; *Heartley v. Nicholson*, 19 L. R. Eq. 233. "Trusts are neither created nor implied by law to defeat the intentions of donors or settlers; they are created or implied, or are held to result in favor of donors or settlers, in order to carry out and give full effect to their intentions": *Standing v. Bowring*, L. R. 31 Ch. Div. 282, per Lindley, L. J. On the other hand, it is equally certain that any undoubted expression of intention to pass the property will make the grantor a trustee, though some formalities may have been wanting: *Penfold v. Mold*, 4 L. R. Eq. 562; *Crawford's Appeal*, 61 Pa. St. 52; 100 Am. Dec. 609; and that the question as to the donor's intention may often be decisive as to the point whether he has constituted himself a trustee or has merely attempted to make a gift: *Jones v. Lock*, L. R. 1 Ch. 25; *Otis v. Beckwith*, 49 Ill. 121. In the last-named case the court said: "Equity, discarding unmeaning and useless forms, will look to the substance of the act done, and the intention with which it was done, and carry out the intention."

Intention Evidenced by a Mere Promise and not Fulfilled is Insufficient. — "The essential question is whether a gift or a promised or intended gift is in truth a perfect act, a completed gift, resting neither in promise merely nor in unfulfilled condition; or was incomplete, was imperfect, and rested merely in promise or unfulfilled intention": *Kekewich v. Manning*, 1 De Gex, M. & G. 176. Hence a mere expression of intention to create a trust, without more, is not enough; like a promise to give, it will not be enforced in equity: *Dipple v. Corles*, 11 Hare, 183; *Forbes v. Forbes*, 3 Jur., N. S., 1206; *Helpenstein's Estate*, 77 Pa. St. 328; 18 Am. Rep. 449; *Wolff's Estate*, 123 Pa. St. 438; *Smith's Estate*, 144 Pa. St. 428; 27 Am. St. Rep. 641; *Lanterman v. Abernathy*, 47 Ill. 437; *Pringle v. Pringle*, 59 Pa. St. 289. Thus in *Bayley v. Boulcott*, 4 Russ. 345, the evidence showed that a mother entitled to a considerable property under the will of a relation, in a conversation with the executor of that relation, expressed an intention to make a settlement of part of the property, which was standing in the executor's name, upon his daughter, and requested the executor to instruct her solicitor to prepare such a settlement. On the prepared settlement being brought to her for execution, she had changed her mind, and refused to sign it. It was held that her intention, expressed in the conversation with the executor of her relative, did not amount to a declaration of trust. Nor does it make any difference that the intention so expressed has been partly carried out. Thus where a devisee said at the funeral of the testator that he would divide

the property equally between his brothers and sisters and himself, that it might not be said that he had taken any more than the others, and subsequently acted, with respect to a portion of the property, according to the intention thus expressed, it was nevertheless held that with regard to the property which remained undivided, that the expressions of the devisee were no more than a promise to give and divide it among his brothers and sisters, and that such promise was *nudum pactum*, and did not amount to a declaration of trust in their favor: *Dipple v. Corles*, 11 Hare, 183. The rule illustrated in this case that the intention of an alleged donor, if not carried further than the making of a promise to make a settlement or gift, is of course merely a branch of the more general rule discussed above that a voluntary settlement, which is still executory, will not be enforced. *Dipple v. Corles* should be compared with *Gee v. Liddell*, 35 Beav. 621, the facts of which were somewhat similar. There an executor, who was also residuary legatee, promised to supplement a legacy bequeathed in trust, being convinced that the testator intended to bequeath the larger sum, and continued to pay interest on such sum until his death. The circumstances were held to amount to a complete voluntary trust. The act of performance in this case was plainly applicable to the whole amount promised. A mere declaration of a vendee that he intends to buy for another, will not raise an enforceable trust, unless there is evidence of a previous agreement that he is to do so: *Lloyd v. Lynch*, 28 Pa. St. 419; 70 Am. Dec. 137. Nor is a trust created by a written acknowledgment by A that B is entitled to property, without proof of consideration. Such a writing is merely an agreement to convey: *Thompson v. Branch*, Meigs, 390; 33 Am. Dec. 153. So, if one who has had his life insured writes to his father and sisters that the insurance was made for their benefit, it amounts only to an executory agreement to create a trust in the future, and the trust is not enforceable: *Estate of Webb*, 49 Cal. 541. So also it is held that a promissory note, being merely evidence of an executory contract to pay money at a future date, will not be enforced, if given without consideration, against one who has executed it to a trustee for the benefit of another: *Phillips v. Frye*, 14 Allen, 36; *Darley v. Darley*, 3 Atk. 399.

Intention Evidenced by an Ineffectual Attempt to Assign Property to Another. In the cases cited in the preceding subdivision the existence of a trust was denied because the court believed that there was an absence of intention on the part of the donor to divest himself of his dominion over the property. In another class of cases equity refuses to interfere because the donor has undertaken to carry his intentions into effect by methods sanctioned at law, and which, if properly pursued, are entirely effectual to change the legal title to the property. Under such circumstances the person claiming the benefit of the gift is forced to stand upon his legal rights, however clearly expressed may be the intention of the donor to transfer the property to him. In other words, equity will not perfect an imperfect gift, nor impute a trust, where none was in contemplation: *Milroy v. Lord*, 4 De Gex, F. & J. 264-274; *Warriner v. Rogers*, L. R. 16 Eq. 340; *Richards v. Delbridge*, L. R. 18 Eq. 11; *Antrobus v. Smith*, 12 Ves. Jr. 39; *Edwards v. Jones*, 1 Mylne & C. 226; *Dillon v. Coppin*, 4 Mylne & C. 647; *Heartley v. Nicholson*, L. R. 19 Eq. 233; *Taylor v. Staples*, 8 R. I. 176; 5 Am. Rep. 556; *Barnum v. Reed*, 136 Ill. 389; *Wittingham v. Lighthipe*, 46 N. J. Eq. 429; *Baltimore Retort etc. Co. v. Mali*, 65 Md. 93; 57 Am. Rep. 304; *Flanders v. Blandy*, 45 Ohio St. 108; *Estate of Smith*, 144 Pa. St. 428; 27 Am. St. Rep. 640; *Hunter v. Hunter*, 19 Barb. 631. In the last-named case it was observed that a mere promise or declaration of intention to give, however clear and positive, is not enough

to constitute a gift *inter vivos*. The intention must have been not only consummated, but carried into effect by those acts which the law requires to divest the donor of and invest the donee with the right of property: *Wadd v. Hazleton*, 137 N. Y. 215; 33 Am. St. Rep. 707. "However anxious the court may be to carry out a man's intention, it is not at liberty to construe words otherwise than according to their proper meaning": *Richards v. Delbridge*, L. R. 18 Eq. 11, per Sir George Jessel, M. R. So also in *Moore v. Moore*, L. R. 18 Eq. 474, Vice-Chancellor Hall remarked that he thought it "very important indeed to keep a clear and definite distinction between these cases of imperfect gifts and cases of declarations of trust, and that the doctrine of declarations of trust should not be extended to supplement what would otherwise be imperfect gifts."

The leading English case on the subject is, *Jones v. Lock*, L. R. 1 Ch. 25. There the evidence was, that the father of a child nine months old put into its hands a check for nine hundred pounds, saying, in the presence of his wife and of the nurse: "I give this to baby; it is for himself, and I am going to put it away for him." He then took it back, saying again that he was going to put it away for him. About the same time he told his solicitor that he intended to add one hundred pounds to the nine hundred pounds and invest it for the benefit of his son. The father died suddenly a few days afterwards without having made any provision for the child, and the check was found in his possession. It was held that there was no complete gift of the check to the infant, and no valid declaration of trust in his favor. This case certainly goes to the extreme limit of the doctrine concerning imperfect gifts, since Lord Chancellor Cranworth, although admitting that the words and acts of the father would have amounted to a valid declaration of trust if it had been his intention to constitute himself a trustee for the infant, preferred to defeat the evident purpose of the father to make a provision for the child by construing his words in their strictly literal sense, even to the extent of ignoring the latter part of the declaration, "I am going to put this away for him." Surely this expression showed an intention on the donor's part to retain the property in his hands for a fiduciary purpose, and not for his own use. In *Young v. Young*, 80 N. Y. 422, 36 Am. Rep. 634, the whole doctrine of imperfect gifts was elaborately examined under circumstances in which the intention of the deceased to pass the property to the donees had been so clearly manifested that Judge Rapallo confessed to "a strong disposition to effectuate that intention, and sustain the gift if possible." The case, however, was by no means so strong as *Jones v. Lock*, L. R. 1 Ch. 25, for the evidence merely showed that the intestate had placed bonds in two envelopes, indorsing and signing a memorandum that they belonged to his sons W. and J. in specified proportions, but that the interest was owned and reserved by him during his life, and that the bonds had never passed out of his control. The reservation of the interest by the donor during his life was plainly a material circumstance, and the opinion of the court was based on the principle that the only practicable method in which a valid gift *in presenti* of an instrument securing the payment of money, reserving to the donor the accruing interest, is by "an absolute delivery of the security which is the subject of the gift to the donee, vesting the entire legal title and possession in him on his undertaking to account to the donor for the interest which he may collect thereon." On these grounds it was held that the gift was imperfect and could not be enforced. On the other hand it is clear that as long as any distinction between declarations of trust and attempts to assign is made, it was impossible to treat as a declaration of trust the mere act of

"signing a paper certifying that the bonds belonged to the sons" of the writer. There was no circumstance whatever, as in *Jones v. Lock*, upon which the court could have seized for the purpose of creating a trust. In *Bottle v. Kocker*, 46 L. J. Ch. 159, the settler wrote, on an agreement into which he entered for the lease of a piece of land on which he erected a house for A. K., and informed A. K. that the house was to be her property, but died before the lease was granted. The gift was held to be imperfect, on the authority of *Mitroy v. Lord*, 4 De Gex, F. & J. 264. So also in *Heartley v. Nicholson*, L. R. 19 Eq. 233, it was held that an intended gift which, for lack of the necessary formalities, was not completed during the intending donor's life, will not be carried into effect by treating him as a trustee of the subject-matter thereof, unless there is proof that he meant to retain such subject-matter as a trustee thereof for the intended donee. Still less will a court of equity compel a donor's personal representatives to complete an imperfect gift by the doing of an act which the donor, if living, might have refused to do: *Walsh's Appeal*, 122 Pa. St. 177; 9 Am. St. Rep. 83. From the principle that a gift, to be enforceable, must have been perfected in the donor's lifetime, it follows that a subsequent recognition of an incomplete gift by the donor's executor will be unavailing to perfect it: *Yancey v. Field*, 85 Va. 756.

Conflicting Decisions. — Some recent English cases have broken in upon the strict rule that equity will not give effect to an imperfect gift by converting it into a declaration of trust. In *Richardson v. Richardson*, L. R. 3 Eq. 686, a voluntary deed in which the donor, by the words "grant, convey, and assign," purported to transfer certain specific property, and all her other personal property, to B., was held to pass the property in certain promissory notes, not specifically mentioned in the deeds, which were found in the donor's possession at her death, though the notes had not been indorsed, and there was no evidence of their delivery to B. Vice-Chancellor Wood, better known by his subsequent title of Lord Hatherley, placed his decision expressly on the ground that a declaration of trust might be made in the form of an assignment, thus giving the broadest possible meaning to the expression used by the Lords Justices in *Kekewich v. Manning*, 1 De Gex M. & G. 176. "A declaration of trust is not confined to any express form of words, but may be indicated by the character of the instrument." In *Penfold v. Mold*, L. R. 4 Eq. 562, the same learned judge adhered to his opinion that any undoubted expression of intention to pass the property will make the grantor a trustee, and declared the case of *Meek v. Kettlewell*, 1 Haro, 464, which held a voluntary assignment of a chose in action, an imperfect gift, to have been overthrown. "That decision," he said, "has been in effect overruled, and it is now held that any instrument may be a sufficient declaration of trust, no form being necessary, the only material question being, 'Did the grantor, or did he not, mean at once to pass the property?'" In *Morgan v. Malleon*, L. R. 10 Eq. 475, a memorandum of a voluntary gift in this form, "I hereby make over to M. an India bond, of the value of one thousand pounds," was signed by S. and given by him to M. without handing over the bond. S. died and the residuary devisees under his will claimed the bond. It was held by Lord Romilly, the master of the rolls, that the memorandum was a good declaration of trust in favor of M., being, as was considered, equivalent to a writing couched in the words, "I undertake to hold the bond for you."

In *Warriner v. Rogers*, L. R. 16 Eq. 340, Sir George Jessel, who succeeded Lord Romilly as master of the rolls, declined to accept the rulings in *Rich-*

ardson v. Richardson, and *Morgan v. Malleson*, on the ground that "if those decisions were right, there never would be a case where an expression of a present gift would not amount to a declaration of trust, which would be carrying the doctrine too far." In *Breton v. Woolson*, L. R. 17 Ch. Div. 416, Vice-Chancellor Hall also refused to defer to their authority, but in an intermediate case, *Baddley v. Baddley*, L. R. 9 Ch. Div. 113, Vice-Chancellor Malins said that he was "not disposed to disagree with them," notwithstanding the remarks of Sir George Jessel in *Richards v. Delbridge*. The opinion of the court of appeals in New York is apparently that of Sir George Jessel and Vice-Chancellor Hall: *Young v. Young*, 80 N. Y. 422; 36 Am. Rep. 634; *Wadd v. Hazelton*, 137 N. Y. 215; 33 Am. St. Rep. 707. But the supreme court of Pennsylvania seems inclined to follow *Richardson v. Richardson*, and *Morgan v. Malleson*. See *Helfenstein's Estate*, 77 Pa. St. 328; 18 Am. Rep. 449; and *Bond v. Bunting*, 78 Pa. St. 210.

From this brief summary it is clear that the discussion of this question can scarcely yet be regarded as closed. The objection made to *Richardson v. Richardson* and *Morgan v. Malleson*, that "if those decisions were right, there never would be a case in which an expression of a present gift would not amount to a declaration of trust," is perhaps not so conclusive as at first sight it appears to be. It seems to us perfectly reasonable to maintain that the effect to be attributed to such an expression of intention should depend upon whether the whole evidence shows that the donor designed it to be final and irrevocable, or wished to reserve himself a *locus penitentiae*. On the one hand, in view of the ordinary behavior of men in regard to such matters, it would be unjust to hold an owner of property and his estate responsible in every instance for an inchoate assignment, evidenced by writings like that in the above cases. But, on the other hand, as long as a declaration by which such an owner constitutes himself a trustee for another is enforced, there is much inconsistency in refusing to give effect to writings of this sort, when the circumstances indicate that the donor intended to part immediately with all control over the property assigned. In its essence, a declaration of trust of this description merely amounts to a statement that the donor has conveyed the beneficial interest in the property to the donee; and apart from precedent, it is difficult to discover any valid reason why a statement of the donor that he has conveyed both the legal and the beneficial interest should, when uncontradicted, be allowed less weight than a statement that he has transferred merely the beneficial interest. If it is unconscientious and therefore inequitable for his representatives to refuse to complete the conveyance in the latter case, it is, so far as can be seen, still more unconscientious and inequitable to refuse to complete the conveyance in the former case. On such grounds as these, it seems fair to argue that the decisions in *Richardson v. Richardson* and *Morgan v. Malleson*, are in harmony with the spirit, if not with the letter of the doctrines of equity relating to declarations of trust. Perhaps, too, it may be thought that the purely technical principle, that a donor who has undertaken to make a legal transfer and not completed it cannot be aided in equity, is scarcely an appropriate one to apply in any state in which law and equity are administered indifferently by the same court. This question does not seem to have been raised, but it is surely not unworthy of consideration, whether this fusion of law and equity ought not to have the effect of obliterating the "thin distinction" which was said in *Beech v. Keep*, 18 Beav. 285, to exist between declarations of trust and attempts to assign, which the donor wishes to be final and binding. A broad and liberal system of jurisprudence which is supposed to have placed judges in a posi-

tion to apply legal or equitable remedies according as justice calls for either, and which has presumably accepted to the fullest extent the equitable principle that, in defining the rights of the parties to any transaction, useless and unmeaning forms are disregarded, and its substance only considered, seems to be not a little illogical in adhering to precedents created under different conditions. Possibly, therefore, the doctrine of *Richardson v. Richardson*, *Morgan v. Malleson*, and *Baddeley v. Baddeley*, may ultimately prevail, and be deemed applicable in all cases in which the policy of some special enactments, like the statute of wills or the statute of frauds, would not be contravened by its adoption.

Illustrative Cases in which the Donor was Held to Have Constituted Himself a Trustee. — One of the earliest cases in the reports is *Ex parte Pye*, 18 Ves. Jr. 149. There the owner of property directed his agent in Paris to purchase an annuity for the benefit of a lady, but the agent supposing that there might be difficulty in her controlling it as a married woman, purchased it in the name of his principal. Thereupon the donor sent the agent a power of attorney with a direction to rectify the error, but died before the instructions could be carried into effect. Upon these facts Lord Eldon decided that there was a complete declaration of trust in favor of the donee. With this case should be compared *Vandenberg v. Palmer*, 4 Kay & J. 204, in which a letter sent by a merchant in China to his agent in London directing him to transfer one thousand pounds from his tea account and employ it in exchange transactions for the benefit of his children, was held to create a complete trust. In *Wheatley v. Parr*, 1 Keen, 551, H. O. directed her bankers to carry two thousand pounds to an account in the names of herself, as trustee for the plaintiffs, and of the plaintiffs, and the bank gave a promissory note for the amount payable to H. O., trustee for the persons therein named. Held, a completed trust. In *Stapleton v. Stapleton*, 14 Sim. 186, a partner in a bank opened an account in one of the books, which was headed as follows: "Dr. Mrs. L. S. (the name of his wife) for the education of B. H. L. and R. S. (the names of his children) Cr.," and he caused an accountable receipt to be signed by his copartner on behalf of the firm, purporting to be for eight hundred pounds received from his wife for the education of his children, and had that sum placed to the credit of the account so opened and his private account with the bank debited with it. Held, an irrevocable declaration of trust in favor of the children. On the other hand, no trust is created by a father's making an entry upon his account book to the credit of a son, in these words: "By further allowance to pay for house, etc., \$5,000." Such an entry is but an indication of the father's intention: *Taylor v. Staple*, 8 R. L. 170; 5 Am. Rep. 556. The testator, by a voluntary deed, covenanted with trustees that in case A. and B., his two natural sons, or either of them, should survive him, his executors should, within twelve months after his decease, pay to the trustees named in the deed sixty thousand pounds upon trust for such of them as should reach the age of twenty-one. The testator retained the deed in his possession until his death, and did not communicate it either to the trustees or to A. and B. Held, that the deed created an enforceable trust for the beneficiaries, and the refusal of the trustee to sue at law did not prejudice their right to recover payment of the debt out of the testator's assets: *Fletcher v. Fletcher*, 4 Hare, 67. An agreement by a donor of certain slaves to pay to the donee a certain sum for the privilege of using their services is a sufficient declaration of trust: *Blake v. Jones*, 1 Bail. Eq. 141; 21 Am. Dec. 530. So where a widower gave a receipt for property to which he was entitled by virtue of his marital

rights, and the receipt contained these words: "It being a benefit for the heirs of S. and T. (his deceased wives), which I hold as guardian for their benefit mutually," it was held that his intention was to constitute himself trustee, and waive his marital rights: *Tanner v. Skinner*, 11 Bush, 120. So also a valid settlement in B's favor is created if A. takes out a policy of insurance on his life with the understanding between him and B. that it is to be for the benefit of B., and an intention on his part to give B. the benefit of it: *Pingrey v. National Ins. Co.*, 144 Mass. 374. An intention to hold bonds as trustee is established by evidence showing that a person placed them in an envelope containing the indorsement over his initials that they are "held for K."; that the interest in the purchaser's account and memorandum books over his signature indicated that the bonds were "bought for," "are the property of," and "belong to" K.; that the interest in such bonds was placed to the credit of K.; that a declaration had been made by the purchaser of the bonds to the father of K. to the effect that "he had laid by or appropriated some bonds for K."; and that the written declarations of the purchaser were carefully preserved by him until his death: *Estate of Smith*, 144 Pa. St. 428; 27 Am. St. Rep. 641. A letter written by a beneficiary under a will to the executor directing him to transfer the property left him to certain persons named was allowed in *Lambe v. Orton*, 1 Drew. & S. 126, to operate as an effectual declaration of trust in their favor. In *Walker v. Crews*, 73 Ala. 412, a father was held to have constituted himself trustee for his daughter by executing a deed whereby he "gave, granted, and conveyed" to her certain promissory notes owing to him by third parties, "the same to have and to hold to the only use and benefit of my said daughter, hereby reserving to myself the right to manage the above amounts as agent for my daughter, with the privilege to collect the money on said notes, and reinvest the property for her, the said child, or reloan on interest." The court was of opinion that sufficient proof of the delivery of this deed was furnished by evidence showing that it was acknowledged and recorded, and that the grantor lived several years after the execution, during which time he, styling himself trustee for his daughter, had assessed to her for taxation personal property, in amount approximating the face value of the notes, but gradually increasing year by year, and paid the taxes thereon. In *Gadsden v. Whaley*, 14 S. C. 210, it was held that a valid trust in favor of a granddaughter was established by evidence that her grandfather had placed certain moneys in the hands of an agent, who thereupon opened an account with the caption, "Colonel Joseph Whaley (the donor), Rebecca Whaley, (the donee), in account with William Whaley, agent"; that the principal item of the expenditures shown in such account was one of money "paid to Mrs. Whaley for support of Rebecca"; and that the donor had executed a will by which he gave nothing to the donee, alleging as a reason that "he had already advanced and made over to her" the moneys deposited with the agent.

Assignments of Equitable Interests. — The effect to be ascribed to this class of assignments depends upon the principle that a transfer which is as complete as the grantor is capable of making is binding upon him, though it is voluntary. The leading case in the subject is *Kekewich v. Manning*, 1 De Gex, M. & G. 176. There residuary estate consisting of money in the funds was bequeathed to a mother and daughter in trust for the mother for life, and afterwards for the daughter absolutely. By a settlement made in contemplation of the daughter's marriage, the daughter assigned her interest under the will to trustees, upon trust for the issue of the intended marriage, and

the niece of the daughter. It was held that there was a complete alienation in favor of the niece, and that the assignment might be enforced at the instance of the trustees of the settlement against the daughter, and the trustees of another settlement which she made upon a second marriage. Knight Bruce, L. J., after laying down the principle that "a person *sui juris*, acting freely, fairly, and with sufficient knowledge, ought to have, and has it in his power to make, in a binding and effectual manner, a voluntary gift of any part of his property, whether capable or incapable of manual delivery, whether in possession or reversionary, and howsoever circumstanced," proceeded thus: "Suppose stock or money to be legally vested in A as a trustee for B for life, and subject to B's life interest, for C absolutely; surely it must be competent for C in B's lifetime, with or without the consent of A, to make an effectual gift of C's interest to D by way of mere bounty, leaving the legal interest and legal title unchanged and untouched. Surely it would not be consistent with natural equity or with reason or expediency to hold the contrary, C being *sui juris*, and acting freely, fairly, and with sufficient advice and knowledge. If so can C. do this better or more effectually than by an assignment to D?" The same doctrine had been previously announced with somewhat unnecessary caution in *Meek v. Kettlewell*, 1 Hare, 464, in the following terms: "If the equitable owner of property the legal interest of which was in a trustee, should execute a voluntary assignment of the property, and authorize the assignees to sue for and recover the property from that trustee, and the assignee should give notice thereof to the trustee, and the trustee should accept the notice and act upon it, by paying the dividends or interest of the trust property to the assignee during the life of the assignor and with his consent, it might be difficult for the executor or administrator afterwards to contend that the gift of property was not complete." Other authorities to the same effect are: *Sloane v. Cadogan*, Sugden's V. & P. App. 26; *Vogle v. Hughes*, 2 Smale & G. 18; *Wilcocks v. Hannington*, 5 Ir. Ch. 45; *Bridge v. Bridge*, 16 Beav. 315. The duty of a trustee, when once fixed, cannot be changed by any circumstance which afterwards occurs, as by the accidental transfer of the trust fund into court: *Rycroft v. Christy*, 3 Beav. 238; or by the vesting of the legal interest in the assignor, there being no evidence that he could have obtained such legal interest at the time of the settlement: *Gilbert v. Overton*, 2 Hem. & M. 110.

This class of voluntary trusts is subject to the same rules as the other classes, and therefore the court will not enforce the settlement unless there is clear and distinct evidence of a declaration in favor of the alleged *cestui que trust*: *Bentley v. Mackay*, 15 Beav. 12; nor will any assistance be given to execute a mere voluntary agreement to transfer property of which the grantor is the beneficial owner: *Colyear v. Countess of Mulgrave*, 2 Keen, 81; *Donaldson v. Donaldson*, 1 Kay, 711; nor will an assignment be upheld unless "everything that was necessary to be done to complete the transfer took place in the lifetime of the settler": *Cunningham v. Phunkett*, 2 Younge & C. 245. In that case the settler gave instructions to his attorney to prepare a settlement for the benefit of A, B, and C, and to procure from the trustees a transfer for the purposes of settlement. The instructions were not signed, but the settlement was prepared and a power of attorney executed by both the trustees; but the settler died before he had seen the settlement, and before the stock was actually transferred. Held, that no trust of the stock was constituted.

Assignment of Stock, Shares, etc. — A voluntary assignment of stock will not be enforced in equity unless the stock is actually transferred in fact.

Such an assignment is regarded as an imperfect gift until the transfer is consummated by the necessary entries on the certificates of stock in the books of the company, and the rule is the same, whether the assignment be made by deed, or otherwise: *Ellison v. Ellison*, 8 Ves. Jr. 656; *Beech v. Keep*, 18 Beav. 285; *Bridge v. Bridge*, 16 Beav. 315; *Dillon v. Coppin*, 4 Mylne & C. 647; *Forest v. Forest*, 34 L. J. Ch. 428; *Heartley v. Nicholson*, 19 L. R. Eq. 233; *Cunningham v. Plunkett*, 2 Younge & C. 245; *Searle v. Law*, 15 Sim. 99; *Badgley v. Votrain*, 68 Ill. 25; 18 Am. Rep. 541; *Baltimore Retort Co. v. Mali*, 65 Md. 93; 57 Am. Rep. 304. Nor can an attempted gift of shares be treated as a declaration of trust merely because the donor transmits dividends thereon to the donee. Such an act need not necessarily be referred to his character as trustee, since it is equally applicable to his character as donor only: *Heartley v. Nicholson*, 19 L. R. Eq. 233.

Assignment of Choses in Action.—The doctrine of the earlier cases upon this subject may thus be stated in the words of the court in *Sewell v. Mossey*, 2 Sim., N. S., 189: "An assignment of a chose in action does not convey any legal right. In the view of a court of equity, it operates only as an agreement; and, if it is voluntary, the court will not enforce it, at the suit of the assignee against the assignor." To the same effect are *Meek v. Kettlewell*, 1 Hare, 474; *Edwards v. Jones*, 11 Mylne & C. 226; *Ward v. Audland*, 8 Beav. 20; *Scales v. Maude*, 6 De Gex, M. & G. 43. In *Penfold v. Mold*, 4 L. R. Eq. 562, however, this doctrine was declared to have been overruled, and it is believed that the weight of authority is now in favor of the opposite view: *Blakely v. Brady*, 2 Dru. & Walsh, 311; *Roberts v. Lloyd*, 2 Beav. 376; *Fortescue v. Barnett*, 3 Mylne & K. 36; *Avrey v. Hall*, 3 Smale & G. 315; *Parnell v. Huegston*, 3 Smale & G. 337; *Pearson v. Amicable Office*, 27 Beav. 229; *Kekewich v. Manning*, 1 De Gex, M. & G. 187; *Elliott's Appeal*, 50 Pa. St. 75; 88 Am. Dec. 525; *Ellis v. Secor*, 31 Mich. 185; 18 Am. Rep. 173; *Blackerby v. Holton*, 5 Dana, 520; *Bond v. Bunting*, 78 Pa. St. 210; *Camp's Appeal*, 36 Conn. 88; 4 Am. Rep. 39; *Re Bellasis*, 12 L. R. Eq. 218. But an assignment is incomplete without delivery: *Basket v. Hassell*, 107 U. S. 602; *Pringle v. Pringle*, 59 Pa. St. 281; *In re Crawford*, 113 N. Y. 560; and the delivery must be such as to confer upon the donee the present right to reduce the fund into possession: *Basket v. Hassell*, 107 U. S. 602; *Sterling v. Wilkinson*, 83 Va. 791. So strictly is this requirement of delivery enforced that in the recent case of *Yancey v. Field*, 85 Va. 756, it was held that, where delivery of a bond was impossible, because it was deposited with a court commissioner as one of the papers in a pending suit, the only way in which the assignment of the bond could be rendered complete was by a delivery of the receipt given by the commissioner therefor. But it was remarked by the court that this was a hard case. Hence the mere indorsement of the name of the intended donee on a bond not followed by delivery will not pass title to it: *In re Crawford*, 113 N. Y. 560; *Zimmerman v. Streper*, 75 Pa. St. 147. On the other hand since a note can only be assigned by indorsement, a transfer by a voluntary deed, purporting to assign a note in trust for donee, cannot be upheld: *Ryan v. May*, 14 Ill. 49; *Fortier v. Darst*, 31 Ill. 212; *Badgley v. Votrain*, 68 Ill. 25; 18 Am. Rep. 541. An assignment of money in a bank is not perfected by a check payable at a future day, and the donor's estate will not be bound by such an instrument: *Curry v. Powers*, 70 N. Y. 212; 26 Am. Rep. 577. A valid gift may be made of a debt due from the donee to the donor; and such gift may be consummated by the delivery of a receipt in full: *Gray v. Barton*, 55 N. Y. 68; 14 Am. Rep. 181; and the intention of an obligee to make a gift of the interest on a bond to the obligor, evidenced by his declarations

for that purpose, is sufficiently executed by an indorsement of payment, in the presence of the obligor, each time the interest becomes payable, to be valid and effective against an heir at law after the obligor's death: *Lewis's Estate*, 139 Pa. St. 640.

That a voluntary settlement in trust of an insurance policy may be enforced is now fully conceded: *Pingrey v. National Life Ins. Co.*, 144 Mass. 374; *Bond v. Bunting*, 78 Pa. St. 210. A brief statement of the facts in a few cases will illustrate the circumstances, under which the courts allow such a settlement to be valid. In *Fortescue v. Barnett*, 3 Mylne & K. 36, J. B. made a voluntary assignment by deed, of a policy of insurance upon his own life, for the benefit of his wife and children. The deed was delivered to one of the trustees, but the grantor kept the policy in his possession. No notice of the transfer was given at the insurance office, and J. B. afterwards surrendered the policy for a valuable consideration, to the insurers. It was held that delivery of the policy itself to the trustees was not necessary to complete the assignment, and that a valid trust had therefore been created which could not be affected by the omission to give notice at the office. In *Pearson v. Amicable Office*, 27 Beav. 229, and *Seiwell v. King*, L. R. 14 Ch. 179, the same doctrine as to the immateriality of the omission to notify the insurer of the transfer was again asserted. The last case goes very far in upholding these settlements of insurance policies. K. being about to marry a second wife wrote to one of the trustees of the settlement made at the time of his first marriage a letter in which he said that he was desirous of making a settlement upon his children of six policies of insurance on his own life, the particulars of which he gave. Three of the policies were handed to the trustee, the other three being deposited with the office as a collateral security; but he undertook to pay off the amount claimed upon these three, so as to leave them free. He also undertook to execute to the trustee written to and another to be afterwards designated, an assignment of the six policies, with covenants for certain purposes. The letter concluded with the words: "Until the settlement is executed I am to be bound by this agreement in the same manner as if the settlement were actually executed." This letter and the three policies not deposited were sent a few days after the date of the letter with another letter containing this sentence: "The inclosed is the formal letter of assignment previous to a deed and as binding." Vice-Chancellor Hall held that the fact of the settlers undertaking to execute a formal assignment containing certain other clauses, which would not have interfered with its substance, did not render the settlement executory or incomplete. The express declaration of the settler that, "until the settlement was executed, he was to be bound by the agreement," set forth in the first letter, was sufficient to negative that view. "In my opinion," said the learned judge, "it would be absurd to say that when a person has intended and desired and striven to do everything necessary to make a settlement, the court will not hold it to be a sufficient settlement." Mr. Lewin doubts whether this case was correctly decided, for the reason that something further was contemplated by the settler to make the assignment complete. But the ruling seems to us fully justified by the emphatic declaration of the settler that he considered himself bound by his statements in the letter, evidently implying that, whether the more formal assignment should or should not be afterwards executed, he had no intention of retiring from his position in regard to the ownership of the policies. In fact the transaction may be fairly regarded as essentially a perfected settlement with a power of revocation reserved, a circumstance which, it seems to be agreed,

will not render a settlement the less binding or valid: *Stone v. Hackett*, 12 Gray, 227; *Pingrey v. National Life Ins. Co.*, 144 Mass. 374; *Estate of Smith*, 144 Pa. St. 428; 27 Am. St. Rep. 641; *Lines v. Lines*, 142 Pa. St. 149; 24 Am. St. Rep. 487. But in order that an assignment of a policy may be effectual, it must pass out of the control of the assignor. Hence where T., having executed an assignment and placed it together with the policy in a sealed envelope, on the outside of which he wrote the name and address of the assignee, adding, "please send this to him on my death," with his name subscribed, afterwards put the envelope in the safe of the firm of which he was a member and during all the interval between the assignment and his death continued to pay the premiums on the policy the assignment was held incomplete: *Trough's Estate*, 75 Pa. St. 115.

Gifts from Husband to Wife, How far Sustained as Declarations of Trust. — That a gift or grant by a husband to his wife, though bad in law, might within certain limits be upheld in equity as a declaration of trust in her favor, was the doctrine of the English courts, before the passage of the married women's property act made it permissible to make such gifts directly. In this country, as will be seen from the note to *Wilder v. Brooks*, 88 Am. Dec. 54-56, most of the courts, including the supreme court of the United States, relaxed the rule still further, and laid down the broad principle that the technical reasons of the common law, which prevented the husband from conveying property directly to her, have long ceased to be applicable where he undertakes to make a voluntary settlement for her use, and that such a conveyance is valid, unless it is fraudulent or impairs the rights of creditors. The effect of these decisions, and of the various married women's property acts has been to render the earlier cases of little more than historical interest to the American lawyer, and it will therefore be sufficient for our present purposes to refer to the above note and to the various treatises dealing with the subject of husband and wife.

Effect of Retention by Grantor of the Instrument Creating a Voluntary Trust. In the well-known case, *Antrobus v. Smith*, 12 Ves. Jr. 39, Sir William Grant made the following remarks: "There have been cases, in which a voluntary conveyance kept in the possession of the party during his life, and in his possession at the time of his death, has been held to operate against his will. But in those cases there was a complete conveyance, a transfer at law of the property; nothing requisite to add to the validity of it; the instrument permitted to remain uncanceled; and all that the court was called upon to do was to say that a will, a mere voluntary act, as much as a deed, should not be a revocation of the deed; that is, that the court would not deny to the deed its legal operation." In that case a receipt for a subscription to a company, with an indorsement signed by the owner, declaring that he thereby assigned to his daughter all his title and interest, was found among the owner's papers after his death, and there was no evidence that he ever parted with the paper. Held that the assignment was not enforceable. A similar ruling was made in *Young v. Young*, 80 N. Y. 422, 36 Am. Rep. 634, where the retention was merely for the purpose of collecting the interest on the bonds which the instrument purported to transfer. On the other hand, if the conveyance is fully executed, it is well settled that the mere retention of the document by the grantor will not impair the validity of the gift, "unless there is clear and decisive proof that he never parted or intended to part with its possession": *Brinckerhoff v. Lawrence*, 2 Sand. Ch. 442 (containing an elaborate review of the authorities); *Exton v. Scott*, 6 Sim. 31; *Hall v. Palmer*, 3 Hare, 532; *Barlow v. Heneage*, Prec. Ch. 211; *Clavering v. Claver-*

ing, 2 Vern. 471; *Roberts v. Williams*, 4 Hare, 130; *Bonfield v. Hassell*, 32 Beav. 217; *Fletcher v. Fletcher*, 4 Hare, 74; *Pringle v. Pringle*, 59 Pa. St. 281; *Wallace v. Bardell*, 97 N. Y. 13; *Ellis v. Secor*, 31 Mich. 185; 18 Am. Rep. 178; *Henson v. Kinard*, 3 Strob. Eq. 371; *Love v. Francis*, 63 Mich. 181; 6 Am. St. Rep. 290; *Blalock v. Miland*, 87 Ga. 573; *Souwerby v. Arden*, 1 Johns. Ch. 240; *Bunn v. Winthrop*, 1 Johns. Ch. 329. In 4 Kent's Commentaries, 456, the rule is stated thus: "If both parties be present and the usual formalities of execution take place, and the contract is to all appearance consummated without any conditions or qualifications annexed, it is a complete and valid deed notwithstanding it be left in the custody of the grantor." But if the deed is not actually delivered, it will not pass the title of the grantee, without proof of the grantor's intention to pass it: *Fisher v. Hall*, 41 N. Y. 416; *Martin v. Ramsey*, 5 Humph. 349; and the retention of the instrument may be considered as evidence of the lack of intent: *Uniacke v. Giles*, 2 Moll. 25; *Cotton v. King*, 2 P. Wms. 358; *Antrobus v. Smith*, 23 Ala. 219; *Uran v. Coates*, 109 Mass. 581; *Gerrish v. Institute for Savings*, 128 Mass. 159; 35 Am. Rep. 365; *Otis v. Beckwith*, 49 Ill. 121; *Connecticut Riv. Sav. Bank v. Albee*, 64 Vt. 571; 33 Am. St. Rep. 944. It follows from the above principles that, if a binding, voluntary deed of settlement which is thus retained is destroyed by the settler, it may be re-established against the legatees claiming under his will: Note to *Sear v. Ashwell*, 3 Swanst. 411.

Effect of Retention of Subject of Settlement. — Since delivery is essential to the consummation of a gift, it follows that whenever the donor undertakes to divest himself of the entire ownership, either by a direct transfer to the donee or by conveyance to trustees to hold for the donee's benefit, the transaction will not be complete unless there is actual delivery of the thing given or of the instrument by which the donor signified his intention of parting with the control over it. "Delivery by the donor, either actual or constructive, operating to divest the donor of possession of, or dominion over, the thing, is a constant and essential factor in every transaction which takes effect as a completed gift. Anything short of this strips it of the quality of completeness, which distinguishes an intention to give, which alone amounts to nothing, from the consummated act, which changes the title. The intention to give is often established by most satisfactory evidence, although the gift fails. Instruments may be ever so formally executed by the donor, purporting to transfer title to the donee, or there may be the most explicit intention to give, yet unless there is delivery the intention is defeated": *Beaver v. Beaver*, 117 N. Y. 421; 15 Am. St. Rep. 531; *Camp's Appeal*, 36 Conn. 88; 4 Am. Rep. 39; *Gardner v. Merritt*, 32 Md. 78; 3 Am. Rep. 115; *Poullain v. Poullain*, 79 Ga. 111; *Pringle v. Pringle*, 59 Pa. St. 281; *Adams v. Adams*, 21 Wall. 185; *Tros v. Shannon*, 78 N. Y. 446; *Yancey v. Field*, 85 Va. 756; *Crawford's Appeal*, 61 Pa. St. 52; 100 Am. Dec. 609; *Merinoether v. Morrison*, 78 Ky. 572; *Hunter v. Hunter*, 19 Barb. 631; *Young v. Young*, 80 N. Y. 422; 36 Am. Rep. 634; *Jackson v. Twenty-third St. R'y Co.*, 88 N. Y. 520; *Warriner v. Rogers*, L. R. 16 Eq. 340; *Dougherty v. Moore*, 71 Md. 248; 17 Am. St. Rep. 524; *Curry v. Powers*, 70 N. Y. 212; 26 Am. Rep. 577; *Trough's Estate*, 75 Pa. St. 115; 2 Blackstone's Commentaries, 441; 2 Kent's Commentaries, 438; 2 Schouler on Personal Property, sec. 66, and following sections. But if the intention to pass the property is accompanied by an express declaration of the donor that he holds it in trust for the donee, the reason of the rule ceases to exist, and the rule itself is therefore not applicable: *Milroy v. Lord*, 4 De Gex, F. & J. 264; *Miller v. Clark*, 40 Fed. Rep. 15; *Garner v. Germania Life Ins. Co.*, 110 N. Y. 266; *Estate of Smith*, 144 Pa. St. 428; 27 Am. St. Rep.

641; *Young v. Young*, 80 N. Y. 422; 36 Am. Rep. 634; *Scott v. Berkshire County Sav. Bank*, 140 Mass. 157; *Boone v. Citizens' Sav. Bank*, 84 N. Y. 83; 38 Am. Rep. 498. For further authorities to the same effect, see below, under the subdivision relating to bank deposits in trust.

Acceptance of Gift by Donee. — The rule is well settled that if a voluntary trust is otherwise perfectly created, it will be valid, although the *cestui que trust* does not know of its existence, and has not signified his acceptance of its benefits: *Tate v. Leithead*, 1 Kay, 658; *Paterson v. Murphy*, 11 Hare, 88; *Fletcher v. Fletcher*, 4 Hare, 74; *Cumberland v. Codrington*, 3 Johns. Ch. 261; 8 Am. Dec. 492; *Shepherd v. McIvers*, 4 Johns. Ch. 137; 8 Am. Dec. 561; *Moses v. Murgatroyd*, 1 Johns. Ch. 119; 7 Am. Dec. 478; *Nicholl v. Mumford*, 4 Johns. Ch. 529; *Van Cott v. Prentice*, 104 N. Y. 45; *Connecticut Riv. Sav. Bank v. Albee*, 64 Vt. 471; 33 Am. St. Rep. 944; *Plant v. Storey*, 131 Ind. 46. Under such circumstances, the rule is that acceptance of the gift by the donee will be implied, as in all cases where instruments are executed for the benefit of a specified party: *Blasdel v. Locke*, 52 N. H. 238; *Beaver v. Beaver*, 117 N. Y. 421; 15 Am. St. Rep. 531; *Dunlap v. Dunlap*, 94 Mich. 11; *Stone v. King*, 7 R. L. 358; 84 Am. Dec. 557; *Doe v. Knight*, 5 Barn. & C. 671. But acceptance, evidenced by expenditure of money on the faith of the validity of a writing, which shows that the maker intends to make a gift, but which is not sufficient to pass the legal estate, will entitle the donee to have the gift enforced: *Dillwyn v. Llewellyn*, 31 L. J. Ch. 658. A demand by the donee for the property given, and his effort to obtain possession thereof, after it has come into the hands of the donor's executors, is evidence of his acceptance: *Hunter v. Hunter*, 19 Barb. 631. An instructive illustration of the above principles is furnished by the case of *Cummings v. Bramhall*, 120 Mass. 552, in which it was held that a perfect trust had been created by a decedent, who transferred bank shares to himself as trustee for his daughter, though he retained control of them, and appropriated the dividends to himself, and the daughter did not know, until after his death, that the transfer had been made.

Acceptance by Trustee. — The general rule is, that if a voluntary trust is perfectly created, neither notice to, nor acceptance by, the trustee is necessary to entitle the *cestui que trust* to have it enforced: *Fletcher v. Fletcher*, 4 Hare, 74; *Stone v. King*, 7 R. L. 358; 84 Am. Dec. 557; *Tierney v. Wood*, 19 Beav. 330; *Jones v. Jones*, 23 Week Rep. 1; *Tate v. Leithead*, 1 Kay, 658; *Elliott's Appeal*, 50 Pa. St. 75; 88 Am. Dec. 525; *Minot v. Tilton*, 64 N. H. 371; *Adams v. Adams*, 21 Wall. 185; *King v. Donnelly*, 5 Paige, 46. But, if the trust is not completely executed, it is held that the mere fact of its being accepted by the donee will not render it enforceable: *Cotton v. Graham*, 84 Ky. 672. In regard to the assignment of an equitable interest, however, there has been some conflict of opinion. In some of the earlier cases the judges seem to have been of opinion that the rights of the new beneficiary would not be perfected unless notice was given to the trustees, and they acted upon the notice: *Rycroft v. Christy*, 3 Beav. 238; *Bridge v. Bridge*, 16 Beav. 315. In *Meek v. Kettlewell*, 1 Hare, 464; 1 Phill. Eq. 342, the vice-chancellor expressly decided that "a voluntary assignment of mere expectancy, not communicated to those in whom the legal interest is, does not create a trust." In *Kekewich v. Manning*, 1 De Gex, M. & G. 176, the Lords Justices, though deciding that an assignment of an equitable interest outstanding in the hands of trustees might be made so as to bind the donor, declined to say whether, in their opinion, the absence of notice would affect the validity of the transfer. The doctrine of the more recent cases, how-

ever, is that no such notice is required so long as only the rights of the grantor and grantee are in question: *Donaldson v. Donaldson*, 1 Kay, 711; *Re May's Trusts*, 5 N. R. 67. As this is the rule in the analogous case of the equitable assignment of a fund in the hands of a debtor: *Muir v. Schenck*, 3 Hill, 228; 38 Am. Dec. 633; and as there seems to be no valid reason for departing in this instance from the general principle that notice to the trustees of a voluntary settlement is not necessary, it is conceived that the doctrine of these later decisions will for the future prevail.

Declarations of Trust Testamentary in Character.—In determining the validity of voluntary settlements, the fact that the gift is not to take effect until after the donor's death is often of controlling weight. A paper of testamentary character purporting to make a gift cannot be turned into a declaration of trust: *Warriner v. Rogers*, 16 L. R. Eq. 340; *Heartley v. Nicholson*, 19 L. R. Eq. 233; *Young v. Young*, 80 N. Y. 422; 36 Am. Rep. 634; citing with approval 2 Schouler on Personal Property, 118. If a paper is to operate as a will, it must be executed with the same formalities as a will: *Badgley v. Votrain*, 68 Ill. 25; 28 Am. Rep. 641; *Olney v. Howe*, 89 Ill. 556; 31 Am. Rep. 105; *Taylor v. Taylor*, 2 Humph. 597; *Egerton v. Carr*, 94 N. C. 648; 55 Am. Rep. 630; *Sterling v. Wilkinson*, 83 Va. 791; *Mitchell v. Smith*, 4 De Gex, J. & S. 422; *Hughes v. Stubbs*, 1 Hare, 476; *Scales v. Maude*, 4 De Gex, M. & G. 43; *Appeal of Waynesburg College*, 111 Pa. St. 130; 56 Am. Rep. 252; *Frederick's Appeal*, 52 Pa. St. 338; 91 Am. Dec. 159. The reservation of a power to revoke, on condition that the beneficiaries should have no legal or equitable right to the principal or income during the donor's life, provisions that the trustee should hold the property subject to grantor's direction and control till his death, and that the trust should at once cease, and determine if any attempt should be made to interfere with the execution thereof, or to claim the property contrary to the conditions imposed, are facts inconsistent with the existence of a perfectly executed trust: *Van Cott v. Prentice*, 104 N. Y. 45. On the other hand, a transfer is not necessarily invalid, because the trust created, in some of its features, looks to a disposition of the property after the donor's death, provided a present interest is vested in the donee and the trust takes effect at once: *Fletcher v. Fletcher*, 4 Hare, 74; *Stone v. Hackett*, 12 Gray, 227; *Thompson v. McDowell*, 2 Dev. & B. 463; *Massey v. Huntington*, 118 Ill. 80. In *Egerton v. Carr*, 94 N. C. 648, 55 Am. Rep. 630, it was said that absence of reservation of authority over or interest in personalty given in trust to be divided after death is strong evidence that the instrument of transfer is a deed, not a will. But it seems that the reservation of a power to direct the trustee as to the manner in which the trust property shall be invested does not necessarily make an instrument testamentary. Thus in *Forney v. Remey*, 77 Iowa, 549, it was held that a written instrument transferring personal property to a trustee, who was charged to pay the income therefrom, after defraying expenses, to the grantor so long as she lives, and to make such investments in real estate as she may direct, and at her death distribute the property in equal shares among her children, was not invalid as being a testamentary disposition of property not executed as required by law, but was a deed of trust operating *in presenti*, and therefore valid. A sealed paper, referred to in the other documents declaring a trust, is a component part of such declaration, and the mere fact that the deed of trust directs that it should not be opened till after the settler's death, does not make it testamentary in character; nor does the fact that the trustee is ignorant of the contents of the paper change the result: *Van Cott v. Prentice*, 104 N. Y. 45. In *Sterling v. Wil-*

Kinson, 83 Va. 791, it was ruled that a written receipt for bonds given by an alleged trustee, who undertook to pay the interest, when collected, to the donor, and in case of his death, to divide the bonds equally among certain persons, did not create a complete and irrevocable trust in favor of the distributees. If the court meant to lay down the general proposition that a provision in an instrument creating a trust by which it is required that the interest accruing from the trust property shall be paid to the donor during his life will render the instrument testamentary, this case seems to be hardly consistent with the authorities cited above. In fact, the court expressly declared in *Young v. Young*, 80 N. Y. 422, 36 Am. Rep. 634, that it is undoubtedly practicable to make a valid gift *in presenti* of an instrument securing the payment of money, reserving to the donor the accruing interest, and stated the ways in which this could be done.

Whether a Trust is Perfectly Created or Not is a Question of Fact in Each Case, and the court, in determining the fact, will give effect to the situation and relation of the parties, the nature and situation of the property, and the purposes or objects which the settler had in view in making the disposition: *Lynn v. Lynn*, 135 Ill. 19; *Jones v. Lock*, 1 L. R. Eq. 25; *Henson v. Kinard*, 3 Strob. Eq. 371; *Gadsden v. Whaley*, 14 S. C. 210. The *onus probandi* lies on the person who sets up the declaration of trust, and the evidence in support of it must be clear and distinct: *Roberts v. Roberts*, 11 Jur., N. S., 992. Testimony in regard to the declarations and acts of the donor, before or about the time at which the gift is alleged to have been made, are admissible for the purpose of showing the intention of the donor, and the character of the act: *Miller v. Clark*, 40 Fed. Rep. 15; *Connecticut Riv. Sav. Bank v. Albee*, 64 Vt. 471; 33 Am. St. Rep. 944; *Hunter v. Hunter*, 19 Barb. 631. But the declarations of such donor made after the creation of the trust are not admissible to rebut the fact of its creation: *Smiley v. Pearce*, 98 N. C. 185; *Connecticut Riv. Sav. Bank v. Albee*, 64 Vt. 471; 33 Am. St. Rep. 944. Nor can parol evidence be received to vary the contents of an instrument creating a trust: *Boykin v. Pace*, 64 Ala. 68; *Pillot v. Landon*, 46 N. J. Eq. 310; as to raise a trust in the proceeds of an insurance policy, expressed to be payable to the "heirs or representatives": *Wason v. Colburn*, 99 Mass. 342. On the other hand, when the written evidence of a trust is ambiguous, such evidence is admissible to rebut the presumption of a trust: *Steere v. Steere*, 5 Johns. Ch. 1; 9 Am. Dec. 256.

Against whom a Voluntary Settlement is Valid — Subsequent Purchasers and Creditors. — As regards voluntary settlements of land, the rule as established in England is, that they may be avoided by creditors or by subsequent purchasers with or without notice: *Williamson v. Codrington*, 1 Ves. 516; *Buckle v. Mitchell*, 18 Ves. 112; *James v. Bydder*, 4 Beav. 600; and the cases cited in Chancellor Kent's opinion in *Sterry v. Arden*, 1 Johns. Ch. 261, where this rule was followed. See also Lewin on Trusts, *77. Nor will such a settlement prevail against a second settlement executed upon a marriage: *Sloane v. Cadogan*, Sugden's V. & P. App. 26; *Orober v. Martin*, 1 Dowl., N. S., 15; 1 Bligh, N. S., 573. From this point of view a settlement on a meritorious consideration is deemed voluntary: *Finch v. Winchelson*, 1 P. Wms. 277; *Pulvertoft v. Pulvertoft*, 18 Ves. 99. But a mortgage subsequent to the settlement is a revocation *pro tanto* only: *Perkins v. Walker*, 1 Vern. 17; *Thorne v. Thorne*, 1 Vern. 41. This doctrine is carried out to its logical conclusions, and therefore the existence of a prior voluntary settlement is not a sufficient ground to induce a court of equity to refuse, at the grantee's instance, to enforce a contract to convey land in favor even of a purchaser

who has notice of the trust: *Buckle v. Mitchell*, 18 Ves. 112; *Willots v. Busby*, 5 Beav. 193. Such a grantee, it was said in the former case, "has no more right than the grantor to object to the completion of the contract for the sale of the settled estate." Nor will the court decree that a voluntary conveyance shall be delivered up to a purchaser for value: *Oxley v. Lee*, 1 Atk. 625; *Walker v. Burrows*, 1 Atk. 94; *De Houghton v. Money*, 35 Beav. 98. On the other hand, a vendor will not be assisted to defeat a prior voluntary settlement made by himself, and, when the vendee objects to the title on the ground of such a settlement, specific performance of the contract will not be enforced: *Smith v. Garland*, 2 Mer. 123; unless such vendee expressly says that he is willing to complete the purchase on having a good title: *Peter v. Nicholls*, 11 L. R. Eq. 391. If a covenant is inserted in a voluntary settlement binding the grantor to warrant and defend the land conveyed, the cestui que trust will have a right to satisfaction out of the grantor's personal assets, if he is evicted: *Williamson v. Codrington*, 1 Ves. Sr. 516; but if such a settlement is avoided by a subsequent sale, the volunteer grantee has no equity against the purchase money payable to the grantor: *Daking v. Whimper*, 26 Beav. 568.

In this country the English doctrine is generally repudiated in the more recent decisions, as will be seen from the note to *Jenkins v. Clement*, 14 Am. Dec. 708. In addition to the cases there cited, reference may be made to the elaborate dissenting opinion of Judge Spencer in *Verplank v. Storry*, 12 Johns. 536, 7 Am. Dec. 348, for a powerful criticism of the reasoning of the English courts.

The above rule as to the voidability of voluntary settlements of land rests upon the construction of the statute 27 Eliz., and therefore it is held, even in England, that subsequent purchasers cannot obtain relief against a prior voluntary settlement of personalty made by a person not indebted at the time: *Jones v. Oronche*, 1 Sim. & St. 315; *Bill v. Cureton*, 2 Mylne & O. 503.

Grantor and Persons Claiming Under Him by Voluntary Conveyances.—Whatever view may be taken as to the rights of purchasers, there is no dispute as to the principle that voluntary settlements of all kinds are good against the grantor and those claiming under him: *Leech v. Leech*, 1 Ch. Cas. 249; *Smith v. Garland*, 2 Mer. 123; *Williamson v. Codrington*, 1 Ves. Sr. 516; *Dolphin v. Aylward*, 4 L. R. H. L. 486; *Curtis v. Price*, 12 Ves. 103; *Attorney-general v. Whorwood*, 1 Ves. Sr. 535; *Uniacke v. Giles*, 2 Molloy, 25; and that the first of two voluntary settlements has precedence, whether the latter is a deed or a will: *Villers v. Beaumont*, 1 Vern. 100; *Ellison v. Ellison*, 6 Ves. 656; *Ward v. Audland*, 8 Beav. 201; *Chadwick v. Doleman*, 2 Vern. 530; *Clavering v. Clavering*, 2 Vern. 471; *Orober v. Martin*, 1 Bligh, N. S., 573; *Lanham v. Pirie*, 3 Jur., N. S., 704; *Bolton v. Bolton*, 3 Swanst. 414; *Bennett v. Bernard*, 10 Ir. Eq. 584; *Scott v. Scott*, 11 Ir. Eq. 487; *Boughton v. Boughton*, 1 Atk. 625; *Curtis v. Price*, 12 Ves. 103; *Kopp v. Gunther*, 95 Cal. 64.

Revocation of Voluntary Settlements.—It is well established that an unrevoked trust is valid, even though an express power of revocation has been reserved: *Ellison v. Ellison*, 6 Ves. 656; *Stone v. Hackett*, 12 Gray, 227; *Pingrey v. National Life Ins. Co.*, 144 Mass. 374; *Estate of Smith*, 144 Pa. St. 428; 27 Am. St. Rep. 641; *Dickerson's Appeal*, 115 Pa. St. 198; 2 Am. St. Rep. 547; *Lince v. Lince*, 142 Pa. St. 149; 24 Am. St. Rep. 487; *Von Hesse v. Mackaya*, 136 N. Y. 114; and that the reservation of such a power is necessary to enable the settler to revoke the trust when once it is fully executed. He cannot revoke it at his own pleasure, though, as has been already stated, he

may, according to some authorities, defeat it by a subsequent transfer of the property for valuable consideration: *Anon.*, Amb. 266; *Villers v. Beaumont*, 1 Vern. 100; *Ex parte Pye*, 18 Ves. Jr. 149; *Worrall v. Jacob*, 3 Mex. 270; *Kaye v. Moore*, 1 Sim. & St. 61; *Colleen v. Missing*, 1 Madd. 185; *Graham v. Graham*, 1 Ves. Jr. 274; *Pulvertoft v. Pulvertoft*, 18 Ves. Jr. 99; *Scwall v. Roberts*, 115 Mass. 272; *Paterson v. Murphy*, 11 Hare, 88; *Pedder v. Mosely*, 31 Beav. 159; *Ewing v. Jones*, 130 Ind. 247; *Light v. Scott*, 88 Ill. 239; *Stone v. King*, 7 R. L. 358; 84 Am. Dec. 557; *Mabie v. Bailey*, 95 N. Y. 206; *Salisbury v. Bigelow*, 20 Pick. 174; *Connecticut Riv. Sav. Bank v. Albee*, 64 Vt. 471; 33 Am. St. Rep. 944; *Kopp v. Gunther*, 95 Cal. 64; *Hildreth v. Eliot*, 8 Pick. 293. Nor will a different rule be applied merely because the fund has got back into the settler's possession: *Browne v. Cavendish* 1 Jones & L. 637. The essential question in each case is whether an immediate beneficial interest has vested in the *cestuis que trust*: *Ritter's Appeal*, 59 Pa. St. 9; *Taylor v. James*, 4 Desana. Ch. 5; *Gaylord v. La Fayette*, 115 Ind. 423; *Sargent v. Baldwin*, 60 Vt. 17. If that is the effect of the instrument, the trust cannot be revoked without their consent: *Minot v. Tilton*, 54 N. H. 371; *Gulick v. Gulick*, 39 N. J. Eq. 401; *Crue v. Caldwell*, 52 N. J. L. 215; *Garner v. Germania L. Ins. Co.*, 110 N. Y. 266; *Ewing v. Shanahan*, 113 Mo. 188. An interest may sometimes vest, even though the designated *cestuis que trust* are not yet in existence, as where a voluntary settlement is made for the benefit of such children as the settler may have: *Peter v. Espinasse*, 2 Mylne & K. 496; *Wright v. Miller*, 8 N. Y. 9; 59 Am. Dec. 438. And where the ultimate enjoyment of the benefits of the trust is postponed, and the rights of the beneficiaries will be lost unless certain acts are performed during the interval that will elapse before the time of enjoyment arrives, the settler cannot, after performing the necessary acts for a given period, defeat those rights by abandoning such performance, but the beneficiaries may protect themselves by doing what is requisite to complete their title to the trust property. Hence a person who has taken out an insurance policy on his own life as trustee for others cannot revoke the trust merely by omitting to pay the premiums after a certain time; for the *cestuis que trust* may keep the policy alive by paying the premiums themselves: *Pingrey v. National Life Ins. Co.*, 144 Mass. 374.

Revocation of Naked Trusts.—"The rule, as it has long existed, and, as affirmed by the courts of England and America, is that where there is a voluntary gift of the entire estate of the donor, a reservation of the principal interest by him, and no power of revocation, the instrument will be held ineffective against its author, unless it appears that there was an intention to make it irrevocable": *Ewing v. Wilson*, 132 Ind. 223; *Farrelly v. Ladd*, 10 Allen, 127; *Beatson v. Beatson*, 12 Sim. 281. In such a case a reconveyance will be decreed, even though the settlement was made for the purpose of defrauding creditors: *Owens v. Owens*, 23 N. J. Eq. 60.

Revocation of Incomplete Trusts.—Where money is delivered by one person to another, without consideration, to be applied to the use of a third person, the order to apply may be countermanded by the depositor at any time before the money has been appropriated to the uses intended: *Thwaatt v. McCullough*, 84 Ala. 517; 5 Am. St. Rep. 391. Similarly the consent of a married woman, given before commissioners, to the transfer and payment to her husband of stock and cash standing in court to her separate account, does not amount to a declaration of trust, and her consent may be revoked at any time before the transfer has been completed: *Penfold v. Mold*, 4 L. R. Eq. 562.

Revocation on the Ground of Mistake, Fraud, etc.—The rules above stated are, of course, subject to the qualification that equity will not allow a voluntary deed of settlement to stand, if its execution is shown to have been the result of mistake, accident, or fraud, or mental incapacity: *Viney v. Abbott*, 109 Mass. 302; *Sewall v. Roberts*, 115 Mass. 272; *Minot v. Tilton*, 64 N. H. 371; *Keyes v. Carleton*, 141 Mass. 45; 55 Am. Rep. 446; *Bridgman v. Green*, 2 Ves. Jr. 627; *Huguenin v. Baseley*, 14 Ves. 273. The donor, therefore, may revoke his gift, if it is not meant to be irrevocable, even though no power of revocation is reserved: *Wollaston v. Tribe*, 9 L. R. Eq. 44; *Forshaw v. Forshaw*, 30 Beav. 243; *Aylesworth v. Whitcomb*, 12 R. L. 298. Some cases lay down the rule that, where no deliberate intention appears in an instrument creating a voluntary trust to make it irrevocable, the omission of a power of revocation is *prima facie* evidence of a mistake: *Aylesworth v. Whitcomb*, 12 R. L. 298; *Garnsey v. Mundy*, 24 N. J. Eq. 243; *Russell's Appeal*, 75 Pa. St. 269. A corollary to this doctrine is that a person taking a benefit under a voluntary settlement in which no power of revocation has been reserved has the burden of proving that the gift was meant by the donor to be irrevocable: *Wollaston v. Tribe*, 9 L. R. Eq. 44. The absence of such a power will sometimes induce the court to set aside the settlement, even when the settler has acted with deliberation and under the advice of friends who really intended it for his benefit: *Beverett v. Beverett*, 10 L. R. Eq. 406. If the mistake is that the settler was ignorant as to what the legal effect of the deed would be, relief will, as a general rule, be denied: *Dupre v. Thompson*, 4 Barb. 280. In the early case of *Lee v. Henley*, 1 Vern. 37, it was said that an omission in a voluntary deed will not be supplied in equity; but, the authorities just cited show that this statement is too sweeping, for the principles there announced are broad enough to cover an omission arising from fraud, mistake, or accident. On the other hand, if reformation of the settlement is asked for merely on the ground that it does not express the alleged intentions of the parties, relief will not be granted, unless all the parties consent: *Phillipson v. Kerry*, 32 Beav. 628; *Brown v. Kennedy*, 33 Beav. 133.

Trust Deeds for Benefit of Creditors.—In England it is the established doctrine that a conveyance of property to trustees for the payment of the settler's debts is voluntary, and therefore revocable at any time before it has been communicated to the creditors and acted upon by them: *Wakeyn v. Coutts*, 3 Sim. 14; 3 Mer. 707; *Garrard v. Lauderdale*, 3 Sim. 1; 2 Russ. & M. 451; *La Touch v. Earl of Lucan*, 7 Clark & F. 772; *Acton v. Woodgate*, 2 Mylne & K. 492; *Steele v. Murphy*, 3 Moore P. C. O. 445; *Re Sanders*, 47 L. J. Ch. 667; *Bill v. Cureton*, 2 Mylne & C. 503; *Johns v. James*, L. R. 8 Ch. Div. 744; *Griffith v. Ricketts*, 7 Hare, 299. In America the creditors are presumed to accept the benefit of the settlement, and it cannot be revoked after the property has come into the hands of the trustees: *Nicoll v. Mumford*, 4 Johns. Ch. 523; *Rankin v. Lodor*, 21 Ala. 380; *Brooks v. Marbury*, 11 Wheat. 78; *New England Bank v. Lewis*, 8 Pick. 113; *Bank of United States v. Huth*, 4 B. Mon. 423; *Cunningham v. Freshorn*, 11 Wend. 241; *Robertson v. Sublett*, 6 Humph. 313. See further on this subject the notes to *Oakley v. Hibbard*, 44 Am. Dec. 426-428; *Gibson v. Oledic*, 90 Am. Dec. 507-510.

Deposits in Trust for Another.—This class of voluntary trusts has given rise to a great deal of litigation, and the decisions of the courts in different states show an irreconcilable conflict of opinion as to the circumstances under which the donor shall be held to have parted with his control of the

subject of the gift. This disagreement seems to have arisen mainly from the peculiar difficulty there is in ascertaining the real intention of the donor under the special circumstances of the case. "We cannot," said Justice Andrews in the recent case of *Beaver v. Beaver*, 117 N. Y. 421, 15 Am. St. Rep. 531, "close our eyes to the well-known practice of persons depositing in savings banks money to the credit of real or fictitious persons, with no intention of divesting themselves of ownership. It is attributable to various reasons, — reasons connected with taxation; rules of the bank limiting the amount which any one individual may keep on deposit; the desire to obtain high rates of interest where there is a discrimination based on the amount of the deposits; and the desire on the part of many persons to veil or conceal from others knowledge of their pecuniary position." In addition, the cases are often complicated by the necessity of considering the effect of the by-laws which are made a part of the contract between the depositor and the bank, and different judges have taken different views as to the meaning of by-laws of a similar character. Under the circumstances, therefore, it is not surprising that this department of the law of voluntary trusts is even less consistent than the others. The most that can be done in any discussion of the subject is to group the cases under convenient headings which will indicate with reasonable clearness the leading principles upon which the decisions have been based. It should be noted that when questions arise as to the validity of transfers, it makes no difference whether the controversy is between the payee and the drawer's legal representatives, or between the payee and the drawee: *Curry v. Powers*, 70 N. Y. 212; 26 Am. Rep. 577. The rights of the parties, therefore, are the same whether it is sought to make the bank or the representatives of the donor a trustee of the fund alleged to have been given. But there is one important exception to this rule, viz.: that where presentation of the pass book is made sufficient authority to the bank to make any payment to the bearer thereof, a payment to the depositor himself or his administrators will discharge the bank in the absence of any notice from the beneficiary, or of any claim or interference by him: *Boone v. Citizen's Sav. Bank*, 84 N. Y. 83; 38 Am. Rep. 498.

Parol Evidence is Admissible to Rebut the Presumption of the Trust. — The principle upon which courts have refused to allow the effect of a perfectly created trust to be attributed to the mere circumstance of making a deposit "as trustee for" or "in trust for" another is thus stated in *Davis v. Lanawac County Sav. Bank*, 53 Mich. 163: "The bank book is no contract, and is only one of the means of indicating the state of the funds. Whatever presumptions may arise from it, and whatever protection may be given to acts innocently done on that presumption, it cannot exclude explanatory evidence"; *Northrop v. Hale*, 72 Me. 275; *Powers v. Provident Inst. for Savings*, 124 Mass. 377. Hence the real purpose of the depositor may be shown by evidence of his antecedent or contemporaneous declarations: *Scott v. Berkshire County Sav. Bank*, 140 Mass. 157; *Connecticut Riv. Sav. Bank v. Albee*, 64 Vt. 571; 33 Am. St. Rep. 944; of contemporaneous facts: *Mable v. Bailey*, 95 N. Y. 206; *Northrop v. Hale*, 72 Me. 275; but not by evidence of depositor's subsequent declarations: *Scott v. Berkshire County Sav. Bank*, 140 Mass. 157; *Connecticut Riv. Sav. Bank v. Albee*, 64 Vt. 571; 33 Am. St. Rep. 944. Thus it may be shown that the object of the depositor in making the deposit in trust for another was to evade a by-law of the bank or a statute limiting the amount that could be received from one depositor: *Brabrook v. Boston etc. Sav. Bank*, 104 Mass. 228; 6 Am. Rep. 222; *Field v. Lonedale*, 13 Beav. 78. So also it is held that the fact that the alleged donor has made

the deposit in trust to escape taxation will not show an intent not to create a trust: *Connecticut Riv. Sav. Bank v. Albee*, 64 Vt. 571; 33 Am. St. Rep. 944. Whether a deposit made in this form to evade the attachment laws will debar the claimant from maintaining an action to recover the money depends upon whether the depositor is seeking to recover from the bank or the donee. In the former case, if the gift is not complete and there is no actual intention to make the transfer, the fraudulent purpose of the depositor will not work a forfeiture of the money to the bank: *Broderick v. Waltham Sav. Bank*, 109 Mass. 149. In the latter case, if the depositor has actually deposited the money in trust for another, signed the usual agreement of assent to the by-laws of the bank in trust for him, and taken a deposit book in trust for him, the money cannot be recovered, for "the law never permits a man to establish his title by proving his own fraudulent act": *Wall v. Provident Inst. for Savings*, 3 Allen, 96.

Under what Circumstances the Gift is Regarded as Complete. — There seems to be an entire unanimity as to the doctrine that extrinsic evidence may be given to show that one depositing money in trust for another did not intend thereby to make a transfer of the beneficial interest in the fund. But as to the point whether such an act is sufficient of itself, when no rebutting evidence is offered, to establish a trust, there is a direct antagonism of opinion between the courts of different states.

The doctrine of one group of cases is thus stated in *Sherman v. New Bedford Sav. Bank*, 138 Mass. 582, approved in *Alger v. North End Sav. Bank*, 146 Mass. 418, 4 Am. St. Rep. 331: "A declaration of trust by the owner, or a deposit of the fund in his name as trustee, or a deposit in the name of another, will not of itself be sufficient to prove a gift or voluntary trust; there must be some further act or circumstance showing a perfected gift of the legal or equitable interest." In support of this rule the following Massachusetts cases are then cited: *Clark v. Clark*, 108 Mass. 522; *Broderick v. Waltham Sav. Bank*, 109 Mass. 149; *Powers v. Provident Inst. for Savings*, 124 Mass. 377; *Cummings v. Bramhall*, 120 Mass. 552; *Eastman v. Wornoco Sav. Bank*, 136 Mass. 208. The basis of this doctrine seems to be that, owing to the peculiar circumstances of the case, the making of a deposit in the name of or in trust for another is a transaction the effect of which must be measured rather by the rules relating to gifts than those relating to declarations of trust. Thus *Scott v. Berkshire County Sav. Bank*, 140 Mass. 157, holds that to constitute a gift to the person in whose name the money is deposited it must have been put in that person's name with the intention of making a gift of it to him, and it must have been accepted by him. The latter requirement is certainly not insisted on, as has been shown above, in the case of ordinary declaration of trust. So also in *Brabrook v. Boston Five Cents Sav. Bank*, 104 Mass. 228, 6 Am. Rep. 222, the court denied the right of the claimant to recover on the ground that the declaration of trust, although evidence that the depositor held the money in some manner for the benefit of the person named as *cestui que trust*, did not of itself transfer to her the possession nor the right of possession, nor constitute a legal title in her. Certainly it is not as a general rule, necessary to the validity of a declaration of trust that it should have any such effect as this. The essence of a declaration of trust is that it transfers merely the beneficial interest to the *cestui que trust*, the legal title remaining in the grantor, and it is this circumstance which distinguishes it from a direct gift.

The opposite doctrine, that a deposit in trust for another gives the latter an immediate beneficial interest in the fund, unless evidence to rebut that

inference is given, was explicitly adopted in New York in the leading case of *Martin v. Funk*, 75 N. Y. 134; 31 Am. Rep. 446, assumed to be correct in the subsequent cases of *Boone v. Citizen's Sav. Bank*, 84 N. Y. 83; 38 Am. Rep. 498; *Mabie v. Bailey*, 95 N. Y. 206; *Beaver v. Beaver*, 117 N. Y. 421; 15 Am. St. Rep. 531. In *Mabie v. Bailey*, however, the court ingrafted on the main rule the very reasonable qualification that deposits in trust merely for A, B, C, D, etc., and not for real persons, show a clear intention not to part with the beneficial interest.

In no other state does either of these doctrines appear to have been categorically laid down, but the one adopted in Massachusetts seems to have commended itself to the courts of Iowa: *Schollmier v. Schoendelen*, 78 Iowa, 426; 16 Am. St. Rep. 455; of New Jersey: *Smith v. Speer*, 34 N. J. Eq., 336; of Michigan: *Davis v. Lenawee County Sav. Bank*, 53 Mich. 163; in New Hampshire: *Marcy v. Amazeen*, 61 N. H. 131; 60 Am. Rep. 320; *Smith v. Ossipes etc. Sav. Bank*, 64 N. H. 228; 10 Am. St. Rep. 400; and of Maryland: *Taylor v. Henry*, 48 Md. 550; 30 Am. Rep. 468; while the one prevailing in New York has apparently taken root in Connecticut: *Minor v. Rogers*, 40 Conn. 512; 16 Am. Rep. 69; in Vermont: *Connecticut Riv. Sav. Bank*, 64 Vt. 571; 23 Am. St. Rep. 944; in Rhode Island: *Ray v. Simmons*, 11 R. I. 266; 23 Am. Rep. 447; *Atkinson, Petitioner*, 16 R. I. 413; 27 Am. St. Rep. 745; in Pennsylvania: *Gaffney's Estate*, 146 Pa. St. 49.

Generally speaking, the above difference of opinion is of little practical importance, for in almost all cases the courts are called upon to consider facts which tend to establish or to rebut the trust, and, under both doctrines, evidence of such facts is admissible. The New York doctrine, however, seems to us to be the most consistent with reason. If the owner of money chooses explicitly to declare himself the trustee for another, why should not such declaration be allowed to be binding in the case of bank deposits as in other cases? The rule which makes extrinsic evidence admissible to disprove the actual existence of the trust is surely a sufficient concession to the peculiar circumstances. If no facts can be adduced which are inconsistent with such an expression of intention, it is no very violent presumption, that the purpose of the declarant is that the trust is final and irrevocable. The courts which have adopted the other view, and required a delivery of the pass book and other corroborating circumstances for the creation of a perfect trust have, we venture to think, very properly been declared by the supreme court of Rhode Island to have failed to distinguish between the necessary incidents of a gift and of a declaration of trust: *Atkinson v. Petitioner*, 16 R. I. 413; 27 Am. St. Rep. 745.

The Existence or Nonexistence of the Trust, therefore, is in practice almost always a question of fact to be determined by the jury from the various facts given in evidence: *Ide v. Pierce*, 134 Mass. 260; and the effect to be ascribed to the transaction will usually depend upon one or more of these circumstances, — whether the donor has parted with his control of the fund through the deposit book; whether the donee has or has not been a privy or party in the acts which are alleged to have created the trust; whether the donor has communicated his intention to the donee or to some one for him. The New York cases above cited appear to be the only ones which have expressly adopted the broad doctrine that a deposit in trust will inure to the benefit of the donee, even if the donor retains the pass book, does not make the donee a party to the transaction, and does not communicate the fact of the trust to anyone, and that, in order to rebut the trust, further evidence of the donor's real intention is required. In Massachusetts this combination

of circumstances has been held fatal to the claim of the alleged donee: *Brook v. Boston etc. Sav. Bank*, 104 Mass. 228; 6 Am. Rep. 222, and doubtless the same result would be held to follow in the other courts in which the Massachusetts doctrine prevails. Generally speaking, however, the validity of the trust will have to be determined in view of the existence of not more than one or two of these circumstances. The following subdivisions will indicate the weight ascribed to such evidence in the different states.

Possession of Pass Book. — The transfer or retention of the pass book which in these cases implies the control of the fund, is usually a circumstance of considerable but not controlling force with the courts which require evidence of the donor's intent in addition to that afforded by his having made the deposit in trust. If the book is retained, the transaction is still regarded as ambiguous, and evidence is admissible to sustain the trust: *Gerrish v. New Bedford Inst. for Savings*, 128 Mass. 159; 35 Am. Rep. 365; *Eastman v. Worcester Sav. Bank*, 136 Mass. 208; *Gardner v. Merritt*, 32 Md. 78; 3 Am. Rep. 115. If retention of the book, however, is combined with an absence of notice of the trust, the trust is in those courts held incomplete: *Idc v. Pierce*, 134 Mass. 260; *Marcy v. Amaseen*, 61 N. H. 131; 60 Am. Rep. 320. But if a deposit is made in trust, and the book is at the same time delivered to the donee, the gift is deemed complete: *Foss v. Lowell etc. Savings Bank*, 111 Mass. 285; *Schollmier v. Schoendelen*, 78 Iowa, 426; 16 Am. St. Rep. 455; *Dougherty v. Moore*, 71 Md. 248; 17 Am. St. Rep. 524.

In New York and the other states which follow the New York doctrine, retention of the pass book is a circumstance of no weight, for the courts apply the ordinary rule as to deposits by trustees, and the book is presumed to be retained by the donor as trustee, and for the purpose of discharging his functions as such: *Martin v. Funk*, 75 N. Y. 134; 31 Am. Rep. 446; *Willis v. Smyth*, 91 N. Y. 297; *Atkinson, Petitioner*, 16 R. I. 413; 27 Am. St. Rep. 745; *Smith v. Ossipee etc. Sav. Bank*, 64 N. H. 228; 10 Am. St. Rep. 400; *Gaffney's Estate*, 146 Pa. St. 49; *Minor v. Rogers*, 40 Conn. 512; 16 Am. Rep. 69; *Buckingham's Appeal*, 60 Conn. 143; *Ray v. Simmons*, 11 R. I. 266; 23 Am. Rep. 447; *Blasdel v. Locke*, 52 N. H. 238; *In Re Crawford*, 113 N. Y. 560; *Connecticut Riv. Sav. Bank v. Albee*, 64 Vt. 571; 33 Am. St. Rep. 944. And the result is apparently not changed by the fact that the alleged donor receives interest on the deposit up to his death: *Petty v. Petty*, 17 Jur. 646. Some courts draw a distinction between the cases in which a declaration of trust is made and those in which a gift is intended, holding that in the latter case the mere fact that money was deposited in the name of another, is not sufficient to create a beneficial interest in the donee, if the donor retains the pass book: *Burton v. Bridgeport Sav. Bank*, 52 Conn. 392; 52 Am. Rep. 602; *Robinson v. Ring*, 72 Me. 140; 39 Am. Rep. 308; *Beaver v. Beaver*, 137 N. Y. 59.

When the deposit book is thus retained, evidence of declarations of the donor may be given to sustain the trust which is, *prima facie*, created by the entries in the book: *Gerrish v. New Bedford Inst. for Savings*, 128 Mass. 159; 35 Am. Rep. 365; *Northrop v. Hale*, 72 Me. 275.

Privity of Donee in the Transaction. — In *Bartlett v. Remington*, 59 N. H. 364, the nonparticipation of the claimant in the transaction, when coupled with alleged donor's retention of control of the fund, was held to be inconsistent with the completeness of the trust, while in *Sweeney v. Boston etc. Sav. Bank*, 116 Mass. 384, the fact that the donee was present, took the deposit book at the time when the deposit was made, and signed the usual agreement to conform to the by-laws of the bank, providing that no person

should receive any part of the moneys deposited without producing such book, was deemed conclusive as to the completeness of the gift. The weight attributed to this circumstance, however, will plainly depend upon whether the Massachusetts or the New York doctrine is followed. Where the latter doctrine prevails, it is of no moment, apart from other considerations: *Martin v. Funk*, 75 N. Y. 134; 31 Am. Rep. 446.

Notice of Trust to Donee. — The general rule is, that if a declaration of trust is intended, and it is otherwise complete, notice to the donee is not necessary to perfect his rights: *Howard v. Windham Sav. Bank*, 40 Vt. 597; *Martin v. Funk*, 75 N. Y. 134; 31 Am. Rep. 446. On the other hand, if a gift is intended, it will not be complete unless accepted before it is revoked: *Brabrook v. Boston etc. Sav. Bank*, 104 Mass. 228; 6 Am. Rep. 222; *Smith v. Ossipee etc. Sav. Bank*, 64 N. H. 228; 10 Am. St. Rep. 400; *Pence v. Burroughs*, 58 N. H. 302. And whether the New York or the Massachusetts doctrine is followed, there seems to be a unanimity of opinion as to the point that notice to the donee, combined with the fact of the deposits being made in trust for him, will make the gift complete: *Minor v. Rogers*, 40 Conn. 512; 16 Am. Rep. 69; *Ray v. Simmons*, 11 R. I. 266; 23 Am. Rep. 447; *Gerrish v. New Bedford Sav. Bank*, 128 Mass. 159; 35 Am. Rep. 365; *Alger v. North End Sav. Bank*, 146 Mass. 418; 4 Am. St. Rep. 331. In the last-named case it was said that notice to the donee is not only satisfactory evidence of an executed intention, but it is a declaration in the nature of an act necessary to complete the transaction and create the trust.

Gifts Invalid Because Testamentary in their Nature. — The effect of provisions in a deed of trust which leave the control of the property in the hands of the settler during his life have already been discussed. Principles of precisely the same character are applicable, when the validity of gifts by means of deposits in trust is to be determined. The general rule is thus stated in *Nutt v. Morse*, 142 Mass. 1: Where one has deposited money in trust for another, but retained the entire dominion and control of the funds, both principal and interest, and the facts show conclusively that he intended that no title to or interest in the funds should pass to the claimants till after his death, the transaction will be held to be in the nature of a testamentary disposition, and to be an attempted evasion of the statute of wills: *Sherman v. New Bedford etc. Sav. Bank*, 138 Mass. 581; *Dougherty v. Moore*, 71 Md. 248; 17 Am. St. Rep. 524; *Smith v. Speer*, 34 N. J. Eq. 336. Nor is the result altered by the circumstance that a statute provides that deposits may be paid after the death of the trustee to the *cestui que trust*. Such an enactment is intended solely for the protection of the bank: *Alger v. North End Sav. Bank*, 146 Mass. 418; 4 Am. St. Rep. 331. On the other hand, the delivery of the bank book of savings deposits, with an assignment of deposits to E on an oral agreement that E should pay the assignor such sums as she should want during her life, and on her death she should pay the balance to the assignor's son, creates a valid trust in favor of the son, and is not invalid as an attempt to evade the statute of wills: *Davis v. Ney*, 125 Mass. 590; 28 Am. Rep. 272.

HUSTON v. REUTLINGER.

[91 KENTUCKY, 333.]

ASSOCIATIONS, BY-LAWS HOW FAR BINDING ON MEMBERS OF. — Since any member of a voluntary association can withdraw therefrom whenever he pleases, the by-laws which are adopted by such association will, as a general rule, be held binding upon him.

When the suspension or expulsion of a member will necessarily result in affecting his financial standing, as well as in depriving him of the use of property that is common to the whole association, however insignificant its value, it is always competent for the court to issue an injunction to prevent the enforcement of an improper by-law against such member.

CONTRACTS OF EMPLOYMENT, ILLEGAL RESTRAINTS UPON. — In all classes of business the employer and employee should be allowed to contract with one another, unrestrained by third persons who may demand that the one shall give more or the other receive less, and restrictions placed upon these rights by combinations or associations of men will, as a general rule, be deemed illegal and void. Therefore an injunction will issue restraining the suspension or expulsion of a member of a voluntary association of underwriters for violating a by-law by which the majority of the association have undertaken to prescribe the number of solicitors which each member shall employ, the time of employment, and the compensation to be paid them, as well as to forbid contracts with solicitors making their salary depend on the number of risks they secure, and to prohibit members from employing a solicitor within a certain period after he has severed his connection with another member.

Harris, Bullitt and Shield, for the appellant.

Byron Bacon, B. F. Buckner, Marshall and Lochre, J. K. Goodloe, O'Neal, Jackson and Phelps, for the appellees.

PRYOR, J. These three actions in equity were instituted in the court below by Adolph Reutlinger, the Franklin Insurance Company, and the Union Insurance Company, against the Louisville Board of Underwriters, in which injunctions are sought to prevent the appellants from enforcing against them certain by-laws adopted by the appellants in the month of August, in the year 1888, and from proceeding to convict them of employing more than one solicitor in the conduct of their insurance business, from denying them business intercourse with the members of the board, and from inflicting certain penalties denounced by its by-laws, found in section seven of the enactment of August, 1888. The appellants and the appellees are all members of the board of underwriters, a voluntary association unincorporated, and governed by a constitution adopted and by-laws

framed by its members. The organization began its existence in the year 1854, and its constitution, as then framed, has remained in substance the same to the date of this litigation. The object of the association, as declared in the preamble to its organic law, is "for the purpose of securing uniformity in the rates of premiums, harmony in the conditions of insurance, and concurrence in the policies they may issue, hereby form an association to be known as 'The Louisville Board of Underwriters,' and for their better organization and government adopt the following articles as their constitution."

The constitution provides the usual machinery necessary to perfect such an organization with provisions that are not objectionable, and no complaint seems to have been made by its members until the by-laws, passed in August, 1888, were attempted to be enforced, and that were framed against the protest of the appellees.

Section four of the by-laws of that date prohibited a local company from employing more than one solicitor, and then for not a period less than six months; and also regulated the manner in which his salary has to be paid, and no solicitor can be employed by any member of the board within twelve months after the termination of his connection as employee of another member. The member employing the solicitor is made responsible for the acts of the latter, and subjected to certain fines and penalties for a violation of the by-laws. Section five makes it the duty of a member to prefer charges when the tariff rates of insurance have been in his belief violated, or any of its by-laws, and this belief he communicates to two other members, who, if they think the facts warrant it, shall unite in making the charges. By section seven the preferring "of charges, as ordained in the foregoing section, shall be taken as *prima facie* evidence of violation, and conviction follows, unless the accused establishes satisfactorily his innocence in twenty-four hours from the time the charge is formally preferred. Absolute business nonintercourse upon every subject and matter relating to insurance shall immediately be established and maintained between the members of the board and the accused member until the charge is officially declared of no effect." The accused is required to deposit fifty dollars with the secretary pending the investigation, and for a willful and deliberate violation of these by-laws, the fifty dollars is forfeited, and the member required to take up any

and all policies written by him in violation of the by-laws. These members, who were the complainants below and appellees here, had more than one solicitor, and were not disposed to admit the right of the association to control them in the employment of solicitors, or in the conduct of their business, further than to produce harmony and uniformity in the insurance business.

This, in fact, seems to be the extent of the power conferred on the association by its constitution and its preamble, with the right to pass such by-laws as may be necessary to accomplish the object in view. This, in fact, is a controversy between the home companies of the city of Louisville and the agents of foreign companies, the latter having a number of agencies, and with greater business or capital to sustain them.

It is proper, first, in determining the rights of these parties, to ascertain the extent to which the chancellor may go in giving the relief sought by the appellees upon the facts alleged in their petitions. There is a plain distinction between the by-law of a corporation that must always at least be within the implied terms of the grant made by the sovereign, and by-laws enacted by a voluntary association that derives its existence from the contract between its members. A member can withdraw from a voluntary association when he pleases, and, as a general rule, such by-laws as are adopted by the association will be held binding on its members. If they have been agreed upon by the members to be passed in a certain manner, and that mode is followed, it is but seldom that the chancellor will interfere. In this case, while the appellant is without capital, it is organized as a business body, and its members, by reason of their connection with it, are given a standing as insurance men, and when indorsed by the association in the way of membership, their honor, fidelity, and ability in the discharge of their duties will scarcely be questioned by the public; and besides, they have become interested in the building they occupy under a lease, with certain maps, charts, etc., that give information as to the character and location of the various buildings in the city of Louisville; and to be expelled from all business intercourse with such an association becomes at once a matter of pecuniary loss to the appellees. Therefore, in this character of case, if the by-laws enacted violate the public policy of the state, or if they are a departure from the object sought to be

accomplished by the contracting parties, and are unjust and unreasonable, the chancellor will not hesitate when called on to protect the parties in the enjoyment of their rights as members of the association. The majority in this case have undertaken to control the business of these appellees; to say how many solicitors they shall employ, and who they shall employ; to renounce all business intercourse with them upon their refusal to submit to rules and regulations that are unreasonable and oppressive; and with no adequate remedy at law, a court of equity is the proper tribunal from which a restraining order should go preventing this unlawful action on the part of the majority. The trial as to one or more of these appellees was had in great haste by the association when learning that the chancellor was at the time being asked to issue a temporary injunction, and the appellees suspended from all business intercourse with their fellow members, and the fifty dollars deposited by each forfeited to the association, because of their refusal to permit their private business to be regulated by the association, and in declining to discharge their employees at its dictation.

The doctrine as to the right of a court of equity to interfere in this class of cases is well stated in the case of *Otto v. Journeymen Tailors' etc. Union*, 75 Cal. 313, 7 Am. St. Rep. 156. It is there said: "Courts will interfere for the purpose of protecting property rights of voluntary associations in all proper cases, and where they take jurisdiction will follow and enforce, so far as is applicable, the rules for incorporated bodies of a like character."

In that case, Otto, a member of the union, had been expelled for working for parties against whom the strike had been ordered, and his trial, the court held, "was a travesty on justice, and lacking all the elements of fairness and good faith which should characterize the action of men in passing on the rights of their fellow men."

The by-laws under which these appellants acted were not only in violation of the spirit and meaning of the organic law of the association, but subversive of every rule of right known to the common law, and in direct hostility to every organic law upon which free government is based. A conviction and suspension of the member follows, unless the accused, within twenty-four hours after the formal declaration of the accusation against him, appears and establishes his innocence, and for the privilege of having such an investigation he is required

to deposit fifty dollars that is forfeited to the association in the event the innocence of the accused is not shown. He is denied the privilege of showing that his business requires the employment of more than one solicitor, or that the by-law requiring him to discharge those in his employ is in violation of the law of the land, but is compelled to abandon all business intercourse with his fellow members, and submit to a judgment of suspension that no chancellor should hesitate in adjudging null and void.

While members of voluntary associations must abide by its rules and regulations, unless contrary to the fundamental law of the order, or in violation of the law of the land, and even then the chancellor might be powerless to afford relief, still, when the suspension or expulsion results necessarily, as it must in this case, in affecting the financial standing of the appellees, as well as in depriving them of the use of property that is common to all, however insignificant its value, we perceive no reason for denying the relief sought.

The majority of the members, under the guise of producing harmony in this business association, have taken from these individual members the right to determine how many men they shall employ in their private business, and then only such as the association may think fit for the position; nor can they employ a solicitor for a less period than six months, or offer a solicitor an employment within twelve months after the solicitor has severed his connection with any other member; is compelled to discharge those in his employ if he has more than one, and, if these by-laws are enforced, have placed their business under the control of the majority vote of the association, a power the exercise of which was not given by the fundamental law of the order, and doubtless not contemplated when the association was formed. The purpose, we think, from the character of this corporate legislation, was to discriminate in favor of certain insurance companies against the appellees; but as these by-laws were adopted by nearly all the members, it may be assumed that no such motive influenced the action of the association in passing them.

The common-law rule, recognized and adopted when business relations were not so multiplied and extensive as now, and when less necessity existed for enforcing it, condemned all such restrictions upon trade and business intercourse with men as is found to exist in this case. The right of one to control his own property as he pleases, and to employ those

necessary to aid him in his business upon such terms as may be agreed on, when not in violation of the law of the land, is the rule of the common law, and the right of the laborer to dispose of his skill and industry to whom he pleases, and for the price agreed on, is embraced within the same rule. In all classes of business the employer and employee should be allowed to contract with each other, unrestrained by others who may demand that the one shall give more or the other receive less, and, as a general rule, when restrictions are placed upon these rights by combinations or associations of men they will be regarded as in violation of law, and void.

An association organized for the purpose of advancing the private interests of members, by which one or all are prevented from employing only a certain number of laborers or agents in the conduct of the business of each, and then only at a fixed rate, is an incentive for those seeking employment as agents in the same line of business to organize counter associations, that are always attempted to be justified under the plea of self-protection, when both are in direct violation of law.

Cooley on Torts, page 280, says: "Anyone has an undoubted right to refuse to be employed by another, but he has no right whatever to resort to compulsion of any sort to keep others from employment." "It is also indictable to combine to engross under one control any particular business staple so as to force from the community its purchase at exorbitant prices": Wharton's Criminal Law, 7th ed., sec. 2324. In the case of *Hilton v. Eckersley*, 6 El. & B. 76, eighteen owners of cotton mills in Lancaster, England, formed a combination by which they agreed that for twelve months they would each carry on their mills with respect to whom they should employ, the wages they should pay, the times they should keep open, etc., according to the direction of the majority of the others. The agreement was held to be illegal, because they had surrendered their discretion as to who they should employ, and were prevented from paying any sum for wages except such as were fixed by the majority, and could only employ such persons as the majority would authorize.

That case is very much like the case being considered, and the English court reached the conclusion, based on the rule of the common law, that these were regulations restraining each man's power of carrying on his trade according to his discretion, denying him the right to employ others, and,

therefore, such restraints on trade as could not be enforced: *Stanton v. Allen*, 5 Denio, 434; 49 Am. Dec. 282; *People v. Fisher*, 14 Wend. 9; 28 Am. Dec. 501; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 178; 8 Am. Rep. 159; *People v. Medical Society*, 24 Barb. 572.

This court, in every instance where the questions involved here, or those similar in their character, have been presented, has followed the common-law doctrine, and what the common law condemns as injurious to the public in interest of trade, and leading to disastrous results, is now being insisted by the appellants as being a restraint upon the exercise of individual rights. We think the experience of business life exemplifies the wisdom of the principle recognized, and if required to depart from it, we would feel inclined to make it more rigid in its application than is now sanctioned by law. In the case of *Sayre v. Louisville Union Ben. Ass'n*, 1 Duvall, 146, 85 Am. Dec. 613, organized for the purpose of affording relief to sick and disabled members, with the power to adopt such rules for their mutual interests, and as common carriers, as shall seem proper, the society passed a by-law declaring that no member shall go into any river or trade, and work for less than a fixed sum, or carry any freight for less than the established rate in the trade, and prohibiting members from advertising or working for any boat not represented in the association, or acting in concert with it, and annexing a penalty for the violation of these by-laws. Sayre was a member of the association, and subscribed his name to the by-laws. He was sued to recover a fine of two hundred and fifty dollars for carrying freight for less than the established rate, and it was held that the by-law under which the fine was imposed was illegal and void. The court in discussing the question laid some stress upon the fact that the parties to the association were common carriers, and therefore compelled by law to carry freight for a reasonable price; but an examination of the authorities, as well as the doctrine announced in that case, will show that any agreement or combination for the purpose of depressing the price of wages, or elevating them, to the injury of the public, is a conspiracy at the common law, and subject to indictment. The laborer has the right to fix his own price for his labor, and the employer the sum he is willing to pay, and combinations entered into for the purpose of preventing the exercise of those rights are unlawful. In the case of *Nash v. Page*, 80 Ky. 539, 44 Am. Rep. 490, where ten warehousemen of the

city of Louisville undertook to exclude the plaintiff from their warehouse as a buyer, it was held that the result of such conduct was to deprive the producers and sellers of free and full competition, and their action was therefore condemned.

In the case of *Anderson v. Jett*, 89 Ky. 375, where the owners of two steamboats, rivals in business, in order to prevent competition, agreed to pool their profits, it was held that as the object of the contract was to prevent competition in the trade, the contract was void, and no recovery could be had for its breach.

We do not mean to adjudge that every agreement or combination detrimental to trade and injurious to the public is an indictable offense; that question is not before us; but we do adjudge that the restraint placed upon these appellees by the by-laws of the association, as to the number of solicitors they may employ, and the time of employment, and the compensation to be paid them, and forbidding them to contract with a solicitor so as to make his pay depend on the number of risks he procures, and forbidding an employment of a solicitor who has severed his connection with another member, are each and all in violation of law, and the judgment of the chancellor, giving the appellees all the rights pertaining to other members of the association, must be affirmed.

ASSOCIATIONS — BY-LAWS — BINDING EFFECT OF. — A member of a voluntary association may be expelled therefrom for a violation of such of its established rules as have been assented to by the members, and as provide expulsion for such violation: *Otto v. Journeyman Tailor's etc. Union*, 75 Cal. 308; 7 Am. St. Rep. 156, and extended note; *Commonwealth v. Union League*, 135 Pa. St. 301; 20 Am. St. Rep. 870, and note. See extended note to *Hiss v. Bartlett*, 63 Am. Dec. 773-778.

ASSOCIATIONS. — RESTRAINING THE EXPULSION OF MEMBERS BY COURTS: *Otto v. Journeyman Tailor's etc. Union*, 75 Cal. 308; 7 Am. St. Rep. 156, and extended note at page 166; *Connelly v. Masonic etc. Ass'n*, 58 Conn. 552; 18 Am. St. Rep. 296, and extended note.

RASH v. FARLEY.

[81 KENTUCKY, 344.]

INTERSTATE COMMERCE — PEDDLERS' LICENSES — CONSTITUTIONAL LAW. —

The clause in the constitution of the United States which gives Congress the power to regulate commerce between the several states does not render unconstitutional a law which makes a person who brings goods, wares, and merchandise from one state into another, for the purpose of peddling them in the latter, liable to pay a peddler's license in the state where they are sold, and subject equally with the citizens of that state to the specified pains and penalties for refusing to pay such license.

PEDDLERS' LICENSES. — A sale, made by a peddler from another state, who has not paid a license tax as required by a law of the state in which the sale is made, is an illegal contract, and a note given for the price of the article which is the subject of such a sale is void.

NEGOTIABLE INSTRUMENTS. — THE RENEWAL OF A NOTE INDUCED BY THE FALSE REPRESENTATIONS OF THE HOLDER will not affect the rights and liabilities of the parties. Hence, where the maker and the holder of a note which is asserted to have been given upon an illegal consideration agree that the validity thereof shall, as between themselves, be determined by the decision in an action which the holder is then prosecuting against the maker of a similar note, and the holder subsequently induces the maker, by means of false representations as to result of that action, to execute another note in renewal of the original, the holder, when seeking to enforce the new note, will be treated as he would have been if he had sued on the original, and if the latter was void, will be precluded from recovery.

Thomas E. Ward, for the appellant.

James F. Clay, for the appellee.

LEWIS, J. In 1880, appellee executed his promissory note to Gillispie & Co., in consideration of lightning rods sold to and put up for him that had been manufactured in Illinois and brought into this state; of which note appellant became holder and owner, and he brought this action on a note given to him in 1884 in renewal of the original.

The ground of appellee's defense is, that the lightning rods were sold by Gillispie & Co., as peddlers, without license, by reason of which the contract of sale and purchase was, under the statute pleaded and relied on, void, and not enforceable; and the general demurrer to the answer having been overruled, and the action upon appellant's failure to reply having been dismissed, this appeal is prosecuted.

The precise question involved was decided by this court in *Rash v. Holloway*, 82 Ky. 674, when a note given to Gillispie & Co. for the same consideration, and under the same conditions as the one executed to them by appellee, was held to be void, because within operation of the statute mentioned.

But it is now argued the statute conflicts with that clause of the constitution of the United States which gives power to Congress to regulate commerce among the several states, and cases decided by the supreme court are cited in support of the position.

The leading case referred to is that of *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489, where a statute of Tennessee was held to be an infringement of the clause mentioned, which provided: "All drummers and persons not having a regular licensed house of business in the taxing district of Shelby County offering for sale, or selling goods, wares, and merchandise therein by sample, shall be required to pay to the county trustee the sum of ten dollars per week or twenty-five dollars per month for such privilege."

In that case, it was held substantially that while a state might impose taxes upon persons within its limits or belonging to its population, and upon vocations and employments pursued therein not directly connected with foreign or interstate commerce, or with some other employment or business exercised under authority of the constitution and laws of the United States, and upon all property within the state mingled with and forming part of the great mass of property therein, it cannot impose taxes upon persons passing through the state or coming into it merely for a temporary purpose, especially if connected with interstate or foreign commerce; nor can it impose such taxes upon property imported into the state from abroad, or from another state, and not yet become part of the common mass of property therein; and no discrimination can be made by any state regulation adversely to the persons or property of other states, and no regulations can be made directly affecting interstate commerce.

But it was not decided in that, nor any other case following it, that goods sent from one state to and already in another state may not be taxed as other general property in the latter that is subject to taxation; and a distinction is made between a tax on the sale of goods then in another state, or the offer to sell them before they are brought into the state imposing it, and a tax in the usual way, and as other goods are taxed, upon such as may have been already brought into the state from another state.

And as conclusive, the court did not mean to hold such statute as is now under consideration unconstitutional, the following language was used in the dissenting opinion deliv-

ered in that case: "I am unable to see any difference in principle between a tax on a seller by sample and a tax on a peddler; and yet I can hardly believe it would be contended that the provision of the same statute now in question, which fixes a license for all peddlers in the district, would be held unconstitutional in its application to peddlers who came with their goods from another state, and expected to go back again."

Section 2, article 3, of the constitution of the United States provides that the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states; but it does not follow that a citizen of one state may go into another and, while enjoying all the privileges and immunities, defy and disregard all the obligations and duties imposed upon citizens of that other; and until it is so plainly decided by the supreme court to the contrary as that there can be no misunderstanding about it, we shall feel it our duty to decide that a person bringing goods, wares, and merchandise from another into this state for the purpose of peddling them is liable just as a citizen of this state to pay the peddler's license, and is subject in the same way to all the pains and penalties for refusing to do so.

It is alleged substantially in the answer, and not being denied, must be taken as true, that there was an agreement between appellant and appellee, before the note sued on was executed, that they would abide the decision of the case of appellant against Holloway, and that he, appellee, who resided in the county, and was ignorant on the subject, was deceived, and induced to execute the note in renewal of the original by false information sent to him by appellant for the purpose of inducing him to execute it, which he would not have otherwise done. In such case, it seems to us, appellant must be treated as he would have been holding and asking judgment on the original note, which was made by statute void, and consequently the court properly overruled the demurrer to the answer and dismissed the action.

Judgment affirmed.

INTERSTATE COMMERCE — PEDDLER'S LICENSES. — As to the power of states to exact licenses for the privilege of doing business within their territory, see extended note to *People v. Wemple*, 27 Am. St. Rep. 561-563. A tax imposed on merchants and other dealers upon their purchases in or out of the state is a license for the privilege of carrying on business within the state, and is valid: *State v. French*, 109 N. C. 722; 26 Am. St. Rep. 590, and

note. But in *Bloomington v. Bourland*, 137 Ill. 534, 31 Am. St. Rep. 332, it was held that the negotiation of sales of goods which are in other states, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce, and cannot be regulated or interfered with by the state in which the negotiation is made.

NEGOTIABLE INSTRUMENTS — RENEWAL. — The renewal of a note previously given by the same parties is not a continuation of a prior obligation, but is a new, separate, and distinct contract: *Galliot v. Planters' etc. Bank*, 1 McMull. 209; 36 Am. Dec. 256.

SPARKS v. BALL.

[91 KENTUCKY, 502.]

REMAINDER-MAN, WHEN NOT LIABLE FOR IMPROVEMENTS MADE BY LIFE TENANT. — The value of improvements made by a life tenant while in possession of land cannot be recovered as a set-off in an equitable action by the remainder-man to enforce the payment of a debt which such life tenant owes him. The principle that he who seeks equity must do equity cannot properly be applied in such a case.

C. B. Seymour, for the appellants.

Helm and Bruce, for the appellees.

HOLT, C. J. In the assignment of dower to Susan Sparks, as the widow of Nimrod Sparks, there was allotted to her land worth eight hundred dollars more than her one-third portion. The decree, therefore, provided that for the use of so much of this excess as would otherwise have at once passed to their son, N. W. Sparks, she should pay to him a certain sum annually. Having failed to pay this annuity for several years, and having in the meantime married H. L. Ball, she, together with her husband, executed to N. W. Sparks, on January 1, 1865, a note for three hundred forty-seven dollars and sixteen cents, and secured its payment by a mortgage upon a lot of ground that belonged to her absolutely, according to the face of the conveyance to her. By the terms of the mortgage it was not enforceable until after her death.

The appellee, Mattie A. Robinson, is her child by the last husband. The mother died in February, 1883. The property mortgaged to N. W. Sparks descended equally to him and his half-sister, the appellee. He now seeks to enforce his mortgage. He also asks that the mortgaged property, which constitutes substantially all the estate left by his mother, be also subjected to the payment of the annuity installments which

accrued between the time of the execution of the note and her death.

The appellee claims that the mortgaged property was held by her mother in trust for her husband, H. L. Ball, during his life, with remainder to the appellee. If it be conceded that there is competent testimony to this effect, yet the arrangement was not evidenced by any writing, the deed for the property to Mrs. Ball is absolute in its terms, and there is no claim of fraud, accident, or mistake in its execution; nor does it appear that N. W. Sparks had any notice of the alleged verbal trust. It cannot, therefore, affect him. She also claims that she was defrauded in the settlement of an indebtedness of her half-brother to her; that there is, in fact, a balance yet owing to her, and this she pleads as a set-off to his claims. This defense is not sustained by the evidence.

We now reach the real and remaining question in the case. It appears that the mother made permanent improvements upon the dower land after its allotment to her, which enhanced its value in a sum exceeding the annuities which she was required to pay by reason of getting more than a third of the deceased husband's realty, and that N. W. Sparks now has the property so improved. It is therefore claimed that as he is a complainant in a court of equity, he must do equity, and that he should not be allowed to subject the property, which has descended jointly to himself and his half-sister, to the payment of the annuity claims against his mother, when he has received property which she, as the life tenant, improved in value in a sum greater than his claims. Some question is made as to the sufficiency in form of the pleading setting up this defense; and it is also claimed the testimony does not show that the improvements were of a permanent character, or that they enhanced the vendible value of the dower land in a sum equal to the annuities. We shall assume, however, in considering the question, that these objections are not well taken. Indeed, this is our opinion.

The question is therefore presented whether the life tenant, or her heir, can, as against a debt owing to the remainder-man, when asserted by him in equity, set up as a defense the value of permanent improvements made by her while in possession of the land as the life tenant. It is claimed that the equitable rule, which, even in the absence of any statute, was applied as between a *bona fide* occupying claimant of land and the real owner, should be applied in a case like this one.

We do not think so, even though hardship may occasionally result. The rule as to occupying claimants was in some cases, heretofore decided by this court, carried to great length. They were, however, all based upon the idea that the improvements were made by him upon the land whilst he *bona fide* considered it his own; and as the owner, unless liable for compensation, would be the gainer by the loss of the possessor, natural justice required he should account for what he thus received in the amelioration of the land. The maxim, that no one ought to be made rich out of another's loss was applied to its full extent. This rule should never be carried so far, however, as to allow one compensation for improvements, who wrongfully takes possession of land, knowing that it belongs to another, because equity will not aid a wrongdoer. When properly interpreted, it merely goes to the extent of holding that "one man shall not be enriched at the expense of another," where the latter does not appear as a wrongdoer.

One man should not be benefited by another's money or labor without making compensation, and one must do what is just before he can exact equity; but this rule should not be so far extended as to unjustly inflict an injury upon a party when he has no agency in the transaction. If the rule were adopted that a life tenant, who knows he is not the absolute owner of the property, and that his interest in it is liable to terminate at any time, could improve it *ad libitum*, and charge the remainder-man with it, injustice would often result. This is not a case where land has been lost by a *bona fide* claimant; the claim is not for compensation for improvements as against a claim for rents for the property improved, but it is sought to extinguish a debt secured by mortgage not upon the improved property, and other indebtedness not secured at all, which the life tenant owed, by a claim for improvements made by the debtor upon property which she held for life only. It does not appear that they were made by the request of the remainder-man. The life tenant made them at her pleasure, knowing that her interest in the property must end at her death. It should be presumed that she made them for her own convenience, and with a willingness to risk whether she would live to enjoy them long enough to recompense her for their cost. If she could charge the remainder man with them, then she, at her pleasure, could improve him out of his estate.

The improvements may be of a character not desired by him; they may be so inferior in quality as to render others necessary in using the property according to his desire, or they may be of so great a value that he may not be able to make the additional ones, and thus he may be forced to sell his property or virtually be deprived of it. The tenant for life is not bound to accept the estate if he cannot render it profitable save at the expense of the remainder-man, and if allowed to do this, then the latter is at his mercy.

It would, in our opinion, be an unwarrantable extension of the equitable rule to which we have alluded to apply it to cases of improvements made by a life tenant without the request of a remainder-man, resulting, in a majority of cases, in wrong and injustice. The life tenant knows he is not the owner of the property; that the remainder party may acquire it at any time by reason of death, and that he is taking the risk in making any improvements upon it. In doing so he must take the risk of being recompensed by their use. The seeming hardship to the appellee may create sympathy; but it or the relation of the parties cannot be allowed to alter the law of the case.

The judgment is reversed, with directions to subject the mortgage property, first, to the payment of the mortgage; and as it appears Mrs. Ball was not otherwise indebted, then to the other annuity debts of both N. W. Sparks and the appellee as may be equitable, and for all further proper proceedings.

ESTATES — IMPROVEMENTS. — A tenant for life cannot charge either the remainder-man or the estate for improvements on the land in which he holds the life estate: *Thurston v. Dickinson*, 2 Rich. Eq. 317; 46 Am. Dec. 56; *Springfield v. Bethel*, 90 Ky. 593.

CALVERT v. RICE.

[91 KENTUCKY, 532.]

WASTE — RIGHT OF LIFE TENANT TO CUT TIMBER. — A life tenant has the right to cut timber for firewood and for the repair of the buildings on the estate. The scarcity of timber does not prevent its use by a life tenant for those purposes, but merely imposes upon him the duty of being more careful in its use, and of cutting only so much as is reasonably necessary to keep the premises in good condition, or so much as would be used by a prudent man who was the owner of the fee and in possession of the land.

THE CUTTING OF ORNAMENTAL TIMBER BY A LIFE TENANT IS WASTE.

Cochran and Son, Edward W. Hines, and T. C. Campbell,
for the appellant.

Wall and Wothington, for the appellee.

PRYOR, J. This is a controversy between the appellants, who are the life tenants, and the appellees, who own the inheritance, and are entitled to the possession when the tenancy expires. It is a petition in equity, with an injunction to stay waste. W. H. Duvall owned at his death a tract of three hundred and twenty-five acres of land lying on the Maysville and Mt. Sterling Turnpike, in the county of Mason. At his death seventy-five acres of this tract, including the dwelling, was allotted to his widow as her dower. She subsequently married the appellant, Jesse Calvert, who has been cutting the timber on the dower land, and converting it into rails for the use of the dower tract. The first husband, Duvall, left one child surviving him, who married the appellee, Rice, and they instituted this action, asking that the appellants be enjoined from cutting any trees on the dower and from committing waste.

The testimony is conflicting as to the number of trees cut and used on the premises by the appellants in repairing the buildings and the fencing. The appellant admits the cutting about fifteen trees, and the appellees say that he cut at least twenty. The main contention arises from the scarcity of timber on the entire farm, it appearing that all the timber is on the dower tract, and covers only about ten or twelve acres of the dower land, and some of that timber is in the yard. It appears that only one tree was cut that was standing in the yard, and that seems to have been decayed, and in such close proximity to the dwelling as subjected it to danger if the tree should fall.

If this case is to be determined upon the idea that there is not a sufficiency of timber on the dower to keep in repair the entire tract, then the injunction ought to go, for it is evident that there is not more than a sufficiency of timber to keep up and continue in permanent repair the dower tract. The scarcity of timber, however, does not prevent its use by the life tenant in repairing the buildings and fencing on the premises. It only requires that he should be the more careful in its use, and only cut so much as would be used by a prudent man when in possession and the owner of the fee, and necessary to keep the premises in repair. It is the duty of the life tenant not to permit the premises to go to destruction for the want of repairs, and particularly when there is timber on the place from which the repairs may be made. It is better for those in remainder that the life tenant should keep the premises in repair, so that when the term expires the owner of the fee receives it in good condition, than to be compelled to receive it as a ruined and dilapidated farm. There is no doctrine better settled than that of the right of the tenant for life to take reasonable estovers from the estate, but not to such an extent as to work an injury to the inheritance; and what is meant by this injury is, that the tenant shall not make an unreasonable use of this right. The right to timber for firewood and repairing buildings is an incident to every life estate to be used for such purposes when on the land. The tenant has no right to cut and use rail timber for firewood when there is other timber that might be used for that purpose, or to even cut and use young and growing timber that would not make more than four or five rails to the cut for fencing purposes. This would be an unreasonable use of it. The proper use of the timber by the tenant, as is said in the text-books and reported cases, "is to give the tenant necessary fuel that he may remain on the premises, and sufficient timber to keep the fences and buildings in repair": 2 Bla. Com.; *Padelford v. Padelford*, 7 Pick. 152; *Miles v. Miles*, 32 N. H. 147; 64 Am. Dec. 362.

Why is it not to the advantage of the remainder-man that the premises should be kept in repair? It is not required or expected of the tenant that he shall expend his money in buying plank or lumber to improve fences and keep the premises in repair, so that the timber may pass from him to the inheritance untouched, although its judicious use may lessen the value of the estate. The owner of the fee would

use this timber if without means to purchase other material, and so would any prudent farmer. He would not cut the timber in the yard left for ornamental purposes, nor could the tenant, without being guilty of waste; but ordinary woodland can be used in a prudent manner for the use of the premises, and that use or the right to use the timber not having been abused by the tenant, we see no reason for an injunction, the effect of which would be to enrich the inheritance at the expense of the life tenant.

The judgment is, therefore, reversed, with directions to dismiss the petition.

ESTATES — RIGHT OF LIFE TENANT TO CUT TIMBER. — A tenant for life has the right to cut and use timber to repair the buildings belonging to the estate: *Dodd v. Watson*, 4 Jones Eq. 48; 72 Am. Dec. 577, and note; *Lynn's Appeal*, 31 Pa. St. 44; 72 Am. Dec. 721, and note. A tenant for life is entitled to take reasonable estovers from his estate: *Miles v. Miles*, 32 N. H. 147; 64 Am. Dec. 362, and extended note; *Webster v. Webster*, 33 N. H. 18; 66 Am. Dec. 705, and note; *Clemence v. Steere*, 1 R. L. 272; 53 Am. Dec. 621, and note. But he is liable for waste if he cuts more of the timber than is necessary to the enjoyment of his estate: *Johnson v. Johnson*, 2 Hill Oh. 277; 29 Am. Dec. 72. Or if he cuts the timber for other purposes than use on the estate he will be liable for waste: *Clark v. Holden*, 7 Gray, 8; 66 Am. Dec. 450, and note; see note to *Allen v. De Groodt*, 14 Am. St. Rep. 632.

MANLY v. BITZER.

[91 KENTUCKY, 596.]

ASSIGNMENT OF WAGES TO BE EARNED IN THE FUTURE. — The transferee for value of wages to be earned in the future under an existing contract for the rendition of services during a specified period is invested with an equity which prevails over that of a creditor who afterwards seeks to attach the same wages. In such a case the wages, being the expected and natural product of the contract right of the employee, have a potential existence which renders them capable of assignment.

Helm and Bruce, for the appellant.

Kohn, Baird, and Speckert, for the appellee.

HOLT, C. J. This is a controversy over the wages of Frank Manly, as a policeman of the city of Louisville. It is between a creditor and a purchaser. The claims of both are *bona fide*. The former, the appellant, Mary Manly, having a judgment for her debt and a return of *nulla bona*, sued out attachments during several months, and garnished the wages of Manly in the hands of the city. He had, however, on or near the first

of each month, and prior to the attachment in each instance, sold the claim for the wages of that month to the appellee, Peter Bitzer. In one instance the sale was on the second day of the month, and when Manly had earned one day's wages. In another it was on the fourth day of the month, and when three days' wages were owing; but in all the other cases it was made on the first day of the month, and was a sale of the then unearned wages of that month.

The claim of the purchaser to them is not resisted by Frank Manly. The policemen of the city are elected by the police commissioners for a term of four years, and until their successors shall be chosen. They are paid at the rate of two dollars per day for the days they in fact serve, payable at the end of each month upon monthly pay rolls. It is a *per diem* allowance, but payable monthly. The services are rendered under a contract for four years' service.

It is contended for the appellant that assignments of wages to be earned are, like mortgages of property to be thereafter acquired, void. It is insisted upon the other hand, that as these wages were to be earned under an existing contract, the wage earner had the right to assign them, and that this contest is merely one of equities, in which the elder must prevail. This is undoubtedly true, if the right existed, because, in a contest between equities merely, that which is prior must, in reason, be given the preference: *Newby v. Hill*, 2 Met. (Ky.) 530.

This elementary rule is not questioned by the counsel for the appellant, but they insist that the appellee, by his purchase, acquired no equity whatever as against a creditor of Manly. Looking at the question from the standpoint of public policy, there are two views presented, which, perhaps, balance each other. If the wage earner in a case like this one be permitted to sell and transfer his unearned wages, the honest creditor may sometimes be defrauded; but, upon the other hand, it may often be necessary to the subsistence of the laborer and his family, as is claimed was true in this instance.

It is a general rule that a mortgage of property to be acquired *in futuro* is void as against the mortgagor's other creditors. It has been held by this court, for instance, that he cannot mortgage not only his stock of goods on hand, but also those he may thereafter add to it. As to those so added the mortgage is invalid as against other creditors: *Ross v. Wil-*

son, 7 Bush, 29; *Loth v. Carty*, 85 Ky. 591. Also, that a mortgage of a crop unsown when it was executed is invalid as against a purchaser for value, the reason being that when the mortgage was given the crop had neither an actual nor a potential existence: *Hutchinson v. Ford*, 9 Bush, 318; 15 Am. Rep. 711.

This case, however, is distinguishable from those. Pomeroy says: "When a party has entered into a contract or arrangement, by the ordinary and legitimate and natural operation of which he will acquire property, his existing right thereunder is not a mere naked hope; it is a possibility of acquiring property, coupled with a legal interest in the contract. The cargo to be obtained or the freight to be earned by a ship on a voyage already contracted for, the wages to be earned under an existing employment, the payment to become due under an existing building contract, are familiar examples": Pomeroy's Equity Jurisprudence, sec. 1286.

Judge Story, in his Equity Jurisprudence, section 1040, announces substantially the same doctrine. If there be an existing or subsisting contract, then a right exists out of which that which is assigned may be derived, and as it may reasonably be anticipated as the outcome, it may be transferred for value, and vest the right to it in the assignee. There is in such a case a potential existence of that which is assigned. In the case now presented there was an existing, subsisting contract for the rendition of the services. The debtor's term of office extended beyond the time when it could fairly be presumed, because of the existence of the contract, the wages would be earned. They had such a potential existence that he had a right to transfer them, and, having done so for value, it invested the assignee with an equity which, being elder in time to that of the attaching creditor, must prevail. It was not the assignment of a mere naked possibility, coupled with no interest. There was an expectation of wages under an employment entered upon under a subsisting contract. Whatever Manly might, therefore, earn had a potential existence, because the wages would be the expected and natural product of his existing contract right. It made no difference whether they were fixed at so much by the day or week or month. Whatever he might earn upon the first day of the month was not so independent of what he might earn during the remainder of the month that he could not assign the entire month's wages. Whatever may be said as to

the right in equity to assign mere possible interests, however much the authorities may differ as to the extent of the power, yet here was a reasonable expectation of means founded upon an existing right; a subsisting contract; an existing employment; and in such a case the transferee for value undoubtedly acquires an equity. A right was *in esse*, under which it could reasonably be expected the party would become entitled to what was transferred. There was ground for a reasonable expectation of means based upon an existing right; it was as if the seed of a crop had been sown, and constituted a subject for a valid contract.

In the case of *Griffin v. Mulliken*, Ky. Sept. 13, 1876, an attaching creditor sought to subject the monthly salary of a city officer to his debt, which had been assigned before it was earned, and it was held that the equity of the assignee was superior. So it seems to us in this instance, and the judgment is therefore affirmed.

ASSIGNMENT OF MONEY TO BECOME DUE — FUTURE EARNINGS.—An assignment of a debt to become due on the completion of a job, or at the expiration of a term of service is valid: *Payne v. Mayor*, 4 Ala. 333; 37 Am. Dec. 744; *Weed v. Jewett*, 2 Met. 608; 37 Am. Dec. 115, and note; *Stevens v. Ogden*, 130 N. Y. 182; *Bank v. City of Bayonne*, 48 N. J. Eq. 246; *Kane v. Clough*, 36 Mich. 436; 24 Am. Rep. 599. A contingent debt founded on an existing contract is assignable: *Mulhall v. Quinn*, 1 Gray, 105; 61 Am. Dec. 414, and note; *Thayer v. Kelley*, 28 Vt. 19; 65 Am. Dec. 220; *O'Connor v. Meehan*, 47 Minn. 247; *Knevals v. Blauvelt*, 82 Me. 458. An assignment by a city contractor of his right to receive warrants subsequently to become due for work done on the streets vests an equitable interest in the assignee: *Stott v. Francy*, 20 Or. 410; 23 Am. St. Rep. 132, and note. In *Edwards v. Peterson*, 80 Me. 367, 6 Am. St. Rep. 207, it was held that an assignment of wages expected to be earned in the future will not be upheld in equity if they were for an existing employment or contract, or if under such circumstances the assignment is made for the purpose of defeating a trustee process for such wages: *Gragg v. Martin*, 12 Allen, 498; 90 Am. Dec. 164, and see notes to these cases. The salary or earnings of public officers are not assignable, for such an assignment is against public policy and void: *Bowery Nat. Bank v. Wilson*, 122 N. Y. 478; 19 Am. St. Rep. 507, and note; *Schwens v. Wyckoff*, 46 N. J. Eq. 560; 19 Am. St. Rep. 438, and note. The subject of the assignment of money to become due is treated in the extended note to *Brackett v. Blake*, 41 Am. Dec. 443, and *Skipper v. Stokes*, 94 Am. Dec. 649.

GARNETT v. FARMERS' NAT. BANK OF CYNTHIANA.

[91 KENTUCKY, 614.]

SURETYSHIP—LIABILITY OF SURETY FOR DEFALCATIONS OF BANK CLERK.—

A surety on the bond of a bank clerk is not liable for loss to the bank caused by employing him out of his sphere; but, if it is shown that the extra duties had nothing to do with the loss, but that it was caused by the clerk's conduct in the sphere of his own office, or by a wrongful use of the opportunities afforded by that office, the surety may be held, unless there is an express provision in the bond that such extra duties shall avoid it.

SURETYSHIP—ASSIGNMENT OF EXTRA DUTIES TO EMPLOYEE, HOW FAR AFFECTS LIABILITY OF SURETY.—

The sureties on the bond of a bank clerk are liable for the money of which he has defrauded the bank by means of false entries and erasures in books of which he has the exclusive charge, but not for the money which his occasional performance of the functions of the regular cashier, during the absence of that officer, enables him to appropriate. In the latter case the bank will be regarded as having empowered him, at its own risk, to assume the more responsible duties of cashier, and as being consequently without remedy on the bond for any wrong he was tempted or enabled to commit by reason of being employed in that capacity.

Ward and Kimbrough, for the appellant.

Forman and Cason, and George C. Lockhart, for the appellee.

LEWIS, J. October 24, 1881, Paul King, being appointed clerk of appellee, together with appellants, his sureties, executed a bond in which they covenanted, in substance, that he, King, as such clerk, would well and truly perform all the duties and services required of him by the board of directors or by the by-laws of the bank or laws of the land, and faithfully fulfill all the trusts confided to him during his continuance in office as clerk. It was further covenanted that no temporary or occasional absence of said King, clerk, from the bank should be claimed or asserted by him or the sureties as impairing the validity of the obligation or the right of the bank to have recourse thereon for any breach of the conditions of the bond, but the same, notwithstanding such absence, should continue in full force. October 29, 1888, appellee brought this action to recover of appellants, sureties of King, he being then dead, the aggregate sum of four thousand six hundred twenty-two dollars and ninety-two cents, of which, it is stated in the petition, the sum of three thousand six hundred twenty-two dollars and ninety-two cents was, between October 24, 1881, and May 7, 1885, fraudulently, and without knowledge of the board of directors, converted by King to his

own use by means of false entries and balances of his individual deposit account; and one thousand dollars thereof was, in January, taken directly from the funds of the bank and appropriated by him.

The verdict of the jury, followed by judgment, was for the whole amount claimed in the petition, less interest; and if King had been alive, and it had been against him alone, there could have been no question of its correctness; for it was shown by evidence, about the competency of which there is no doubt, that he fraudulently appropriated both sums. But appellants, as sureties, are liable, if at all, in virtue alone of the bond, which, by its terms, binds them for the faithful performance by King of services and duties as clerk.

It appears that King kept with the bank the whole time he was clerk an individual deposit account, and by a system of erasures and false entries in the particular book kept by him as clerk he was enabled to deceive both the cashier and directors as to the true state of his deposit account, and thus defraud the bank of the first mentioned of the two sums. But the evidence shows that during occasional absence of the regular cashier, King was in the habit of performing the duties of that office as well as of his own. And one ground for reversal is action of the lower court in overruling the motion to require the plaintiff to specify in the petition the particular amounts paid to or converted by King while he was acting in each capacity. We do not, however, think it was material, even if it had been in the plaintiff's power, to make more specific the allegations on that subject; for the fraud was accomplished as to that particular sum, not by directly abstracting the money, nor by false entries in the cashier's books of amounts deposited by, or paid on checks to, King, but in the manner already referred to, which he could have done whether the cashier was present or absent.

In Morse on Banking, section 17, it is said that on principle it would seem clear: 1. That if loss to a bank is caused by the employment of an officer out of his sphere, the surety is not liable, and to this the cases agree; 2. That if it can be clearly shown that the extra duties had nothing to do with the loss, but that it was caused by the officer's conduct in the sphere of his own office, or by a wrongful advantage of the opportunities afforded by that office, the surety should be held, for it is a loss within the bond, unless there be an express provision that such duties shall avoid it. It is, how-

ever, stated by the author that the cases do not assent to the second proposition if the duties are of a higher grade than those of the bonded office. But the reason for that exception does not exist, and consequently it should not be applied where it is made clearly to appear that the loss was caused alone by the nonperformance or wrongful performance by the officer of the proper and regular duties of his own office; for in such case it cannot be said to have resulted from greater temptation being put in his way or greater facilities being afforded to do the particular wrong than were contemplated and provided for in the bond. It is true the surety has a right to judge of the circumstances and conditions in which he is willing to be liable, and cannot be made so beyond express terms of his bond. But where, as in this case, the clerk is enabled, by simply erasing and changing figures in books of which he has exclusive charge, to not only perpetrate, but conceal from other officers a fraud, we do not see how the loss to the bank thereby caused can be connected with or fairly made a sequence of his performance of the duties of cashier during the occasional and temporary absence of that officer.

In *Home Sav. Bank v. Traube*, 75 Mo. 199, 42 Am. Rep. 402, a case like this, it was said: "It is clear that the sureties could not be held for any defalcation of Rodel as teller, and it may be they should not be held liable for any false entries made by him in order to conceal such defalcation, as they might be regarded as having been indirectly occasioned by the action of the bank in appointing him teller. But when the omission of Rodel to perform his duty as bookkeeper is wholly disconnected from any improper act on his part as teller, and was not superinduced by his appointment as teller, we do not see why the sureties should not be held liable therefor."

In our opinion, the evidence clearly shows that King, without any other opportunity or means than such as his office of clerk afforded, and while acting entirely within the sphere of that office, fraudulently converted the sum of three thousand six hundred twenty-two dollars and ninety-two cents, and the express terms and conditions of the bond being thereby and thus violated, without contributing fault of the bank, his sureties are liable therefor.

But we think it is just as clear they are not liable for the other sum of one thousand dollars; for he was, by being authorized and required to act as cashier, enabled, as well as

tempted, not only to abstract that sum from the funds of the bank, that as clerk he had no right to touch, but to conceal the theft by false entries, or addition of figures, in books that he, as clerk, had no right to handle, but were under exclusive charge of the regular cashier. As the sureties covenanted to answer for the honest and faithful discharge by King of the duties of clerk only, the bank must be regarded as having empowered him, at its own risk, to perform the more responsible duties of cashier, and consequently without remedy on the bond for any wrong he was tempted or enabled to commit by reason of being employed, and while acting in that capacity. There is no need to speculate whether any of the sureties were aware of and contemplated the probable necessity of King taking the place for a long or short time of the absent cashier, inasmuch as the bond does not expressly or by fair implication bind them for his conduct in such case. As the loss of the one thousand dollars resulted from the act of the bank in putting King in a position where he could and did take it, and the sureties did not bind themselves to answer therefor, they cannot be now held liable, and in that respect the judgment is erroneous, and reversed for further proceedings consistent with this opinion.

SURETYSHIP — CHANGE IN EMPLOYMENT OF PRINCIPAL. — In case a surety is bound for the fidelity or capacity of a principal holding a particular office or employment, if the nature of the employment is so changed by the act of the employer that the risk of the surety is materially altered from what was contemplated by the parties at the time of entering into the bond, the surety has a right to say that his obligation does not extend to the altered state of things: *First Nat. Bank v. Gerke*, 68 Md. 449; 6 Am. St. Rep. 453, and extended note; note to *Price v. Dime Sav. Bank*, 7 Am. St. Rep. 372; and see also *Fourth Nat. Bank v. Spinney*, 120 N. Y. 561.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

KIMBALL v. ST. LOUIS AND SAN FRANCISCO R'Y Co.

[157 MASSACHUSETTS, 7.]

CONFLICT OF LAWS — SUITS AGAINST CORPORATIONS ORGANIZED AND DOING BUSINESS IN ANOTHER STATE. — If a suit is pending against a corporation in the court of the state under whose laws it was organized, another action for the same purpose will not be entertained in another state. Though the court of the latter state may have jurisdiction to the extent that its judgment would be valid in the state where the corporation was organized, yet the plaintiffs must necessarily be referred to the courts of the latter state to compel the corporation to respect the plaintiffs' rights in case compulsion should be necessary, and therefore, the plaintiffs ought, in the first instance, to resort to that court which alone can declare the law of the case with authority and can compel obedience to it by force.

JURISDICTION — CORPORATIONS OF OTHER STATES. — The courts of this state will not entertain jurisdiction of a suit against a corporation organized under the laws of another state if the adjudication which might be made in this state would depend for its enforcement upon the courts of the other state and they may say the courts of this state had mistaken the law of the other state.

Suit against a Missouri corporation having a usual place of business in Massachusetts, and five of its directors there residing, to enjoin it from issuing certain bonds unless such bonds should contain a stipulation that the rights of their holders are subordinate to the rights of the complainants as the holders of first preferred stock. The defendant pleaded the pendency of a suit by the plaintiffs against it in the circuit court of the United States for the eastern district of Missouri seeking the same relief as that prayed for here.

J. Lowell and S. C. Eastman, for the plaintiffs.

R. Olney and H. W. Swift, for the defendant.

HOLMES, J. The plaintiffs necessarily will be referred to the courts of Missouri to compel the defendant to respect their rights, in case compulsion is necessary. The most that we can do, if they have the right they claim, is to reduce it to *res judicata*. Whether they have that right is a question of Missouri law touching the internal affairs of a Missouri corporation. The objection to our proceeding with the case was taken at the outset, and we are of opinion that it must prevail. We assume, for the purposes of decision, that we have jurisdiction in such a sense that, if we proceeded to a decree upon the merits, it would be binding in Missouri. But it seems to us clear that, as among the states of this union, the plaintiffs ought to resort in the first instance to that court which alone can declare the law of the case with authority, and can compel obedience to it by force. It would be a misuse of our powers to attempt to control the action of those courts in a case like this, by an adjudication which would depend upon them for enforcement, and which they might say had mistaken the Missouri law: *Smith v. Mutual L. Ins. Co.*, 14 Allen, 336, 343; *Kansas etc. Construction Co. v. Topeka etc. R. R. Co.*, 135 Mass. 34; 46 Am. Rep. 439; *Pierce v. Equitable Life Assurance Soc.*, 145 Mass. 56, 63; 1 Am. St. Rep. 433; *Gregory v. New York etc. R. R. Co.*, 40 N. J. Eq. 38; *North State etc. Min. Co. v. Field*, 64 Md. 151, 154. The later New York cases seem to be put on the construction of a statute: *Prouty v. Michigan etc. R. R. Co.*, 1 Hun, 655, 658; *Ives v. Smith*, 3 N. Y. Supp. 645, 651. Compare *Howell v. Chicago etc. R'y Co.*, 51 Barb. 378; *Berford v. New York Iron Mine*, 4 N. Y. Supp. 836; *Fisher v. Charter Oak Ins. Co.*, 52 N. Y. Sup. Ct. Rep. 179, 189. In *Boardman v. Lake Shore etc. R'y Co.*, 84 N. Y. 157, the defendant was consolidated under the laws of the state of New York, among others.

Bill dismissed.

JURISDICTION — CONFLICT OF LAWS. — Where the subject-matter of a suit in this state is land situated in another state, and a suit is pending between the same parties in relation thereto in such other state, and the court of that other state can do justice to all parties while a court of this state has not jurisdiction of all the parties, the latter court will refuse to entertain jurisdiction, and will leave the parties to the decision of the court in the other state: *Harris v. Pullman*, 84 Ill. 20; 25 Am. Rep. 416; *Johnson v. Kimbro*, 3 Head, 557; 75 Am. Dec. 781. See *Sturgis v. Fay*, 16 Ind. 429; 79 Am. Dec. 440, and note. The question of the power of a court to compel a party to convey lands or deliver property within his control but situated in another state is discussed in the extended note to *Newton v. Bronson*, 67 Am.

Dec. 95. See extended note to *Molynaux v. Seymour*, 76 Am. Dec. 665, on the jurisdiction of foreigners and their property. See extended note to *Myers v. Myers*, 58 Am. Dec. 692, where the question of jurisdiction as dependent upon state sovereignty is discussed. See also extended note to *Buckles v. Ellers*, 37 Am. Rep. 160. No court can by its judgment or decrees bind or affect property beyond the limits of that state: *Wimer v. Wimer*, 82 Va. 890; 3 Am. St. Rep. 126, and note; extended note to *Alley v. Caspari*, 6 Am. St. Rep. 181.

LOKER v. GERALD.

[157 MASSACHUSETTS, 42.]

A DIVORCE OBTAINED IN ANOTHER STATE by a husband from his wife who has always lived in this state for her desertion of him, is valid if he did not become a resident of the other state for the purpose of procuring the divorce, if the cause of action is one recognized by both states and the separation of the wife from her husband was not for justifiable cause.

DIVORCE. — THE DOMICILE OF A WIFE FOLLOWS THAT OF HER HUSBAND WHEN her separation from him is without justifiable cause. Hence the courts of a state to which he removes in good faith, and not for the purpose of procuring a divorce, acquire jurisdiction of both parties and the power to grant him a divorce upon the service of process upon her in the mode prescribed by statute.

WRIT of dower prosecuted by Maggie L. Loker claiming to be the widow of William Loker. Her claim was conceded to be good if she had not been divorced from him by a decree entered in the state of Colorado. She was married to decedent in Massachusetts in August, 1877, but deserted him in March, 1878. On July 24, 1879, he sued her for divorce in a court in the state of Colorado, alleging that he had been a resident of that state for more than one year. The process in the divorce suit was served on the wife in Massachusetts and judgment was entered thereunder against her on November 4, 1879. It was conceded that the husband did not go to Colorado for the purpose of procuring a divorce. The trial court ruled that the decree of divorce was valid and that the defendant was entitled to judgment.

L. H. Wakefield, for the demandant.

P. H. Cooney, for the tenant.

FIELD, C. J. We think that it appears that the divorce was obtained in the state of Colorado in accordance with the statutes of that state, and that the service of process on the wife, who is the demandant in the present action, was also in

accordance with these statutes. The report recites that "it was not claimed by the demandant that the said William Loker went to Colorado for the purpose of procuring a divorce," and it must be taken that he was a *bona fide* resident of that state for more than a year before his suit for divorce was brought, which is the time required by the statutes of Colorado when the cause of divorce occurred in another state. A copy of the bill of complaint for divorce and of the summons was served on the wife in Massachusetts, where she lived; and the causes of divorce set forth by the bill were desertion for more than a year, and adultery, and the court after hearing evidence decreed a divorce from the bonds of matrimony for desertion. Great pains were taken to give the wife notice and an opportunity to be heard. The parties were married in Massachusetts and lived here as husband and wife, but the husband removed to Colorado, and we infer that the wife did not, but remained in Massachusetts, and we infer that the desertion on account of which the divorce was granted began in Massachusetts. The real contention is, that, as the wife was never domiciled in Colorado and was never served with process in that state, the court had no jurisdiction over her to dissolve the marriage.

It must be noticed that, by our statutes, desertion continued for three years, and adultery, are causes of divorce, and that these statutes authorize divorces for causes occurring in other states, even when the parties were not married in this commonwealth, and were not inhabitants of the commonwealth at the time of the marriage, provided the libellant has resided in the commonwealth for five years next preceding the filing of the libel and did not remove into the commonwealth for the purpose of obtaining a divorce: Pub. Stats. c. 146, sec. 5. In practice here, divorces are often granted, in cases in which the libellee has never resided within the commonwealth, upon service made by publication, and by registered letter sent to the libellee, or by notice served upon him or her in another state, as the court may direct: Pub. Stats. c. 146, secs. 9, 10.

The Public Statutes, chapter 146, section 41, provide that "a divorce decreed in another state or country according to the laws thereof, and by a court having jurisdiction of the cause and of both the parties, shall be valid and effectual in this commonwealth," except in certain cases not material to the present inquiry. The various decisions of the courts of

different states and countries on the question of the jurisdiction of a court to dissolve the bonds of matrimony when only the libellant is domiciled within the state or country to which the court belongs, and the effect to be given to a decree of divorce in other states or countries, if the court takes jurisdiction and enters a decree, are well known, and they are fully considered in 2 Bishop on Marriage, Divorce, and Separation, sections 41-190. It is sufficient for the present case to say, that by our decisions, it not appearing that the wife separated from her husband for justifiable cause, her domicile followed his, and that therefore, for the purpose of divorce, the court in Colorado had jurisdiction of both the parties within the meaning of the statute. The fact that our courts grant divorces under somewhat similar circumstances is a reason why, as a matter of comity, we should recognize the validity of this divorce: *Burlen v. Shannon*, 115 Mass. 438.

We are not now required to consider whether the rule of law would not be the same independently of the legal fiction that the domicile of the wife follows that of the husband. The decision in *Cummington v. Belchertown*, 149 Mass. 223, was upon the effect of a decree annulling the marriage *ab initio*, and the court expressed no opinion upon the effect of a decree of divorce made under the circumstances there stated.

Judgment on the verdict.

MARRIAGE AND DIVORCE — EFFECT OF DIVORCE PROCURED IN ANOTHER STATE. — The cases discussing this subject are collected in the notes to *Rigney v. Rigney*, 24 Am. St. Rep. 468; *Tolen v. Tolen*, 21 Am. Dec. 747; *Hanover v. Turner*, 7 Am. Dec. 206. A decree of divorce rendered in another state at the suit of a wife, who removed thither after being deserted in this state, where the citation was personally served on the defendant, is valid in this state: *Harding v. Alden*, 9 Greenl. 140; 23 Am. Dec. 549. Where a husband and wife were married in Massachusetts and the husband went to Illinois and filed his bill in equity, and the wife answered denying the equities of the bill, but afterwards a decree of divorce was entered, the divorce is valid in New York: *Kinnier v. Kinnier*, 45 N. Y. 535; 6 Am. Rep. 132; see *Hunt v. Hunt*, 72 N. Y. 217; 28 Am. Rep. 129. A divorce entered in another state against a wife who at her marriage and ever afterwards resided here, who never appeared in the suit is void against her here although she was personally served with summons: *Williams v. Williams*, 130 N. Y. 193; 27 Am. St. Rep. 517; see *Sewall v. Sewall*, 122 Mass. 156; 23 Am. Rep. 299, and note.

DOMICILE OF WIFE. — A wife's legal domicile is that of her husband: *Harston v. Harston*, 27 Miss. 704; 61 Am. Dec. 530, and note; *Beard v. Knox*, 5 Cal. 252; 63 Am. Dec. 125; *Harding v. Alden*, 9 Greenl. 140; 23 Am. Dec. 549, and note; *Luck v. Luck*, 92 Cal. 653. Unless the wife voluntarily

absents herself under circumstances amounting to wrongful abandonment of the husband and permanently resides in another state: *Prater v. Prater*, 87 Tenn. 78; 10 Am. St. Rep. 623, and note; *Jenness v. Jenness*, 24 Ind. 355; 57 Am. Dec. 355, and note; see extended note to *Succession of Christie*, 98 Am. Dec. 414.

COMMONWEALTH v. GRAHAM.

[157 MASSACHUSETTS, 78.]

CONFLICT OF LAWS. — THE COMMON LAW OF ANOTHER STATE WILL BE PRESUMED to be the same as that of this state.

A MARRIAGE CONTRACTED OUT OF THIS STATE if valid where contracted, is valid here, although the parties intended to avoid our laws, unless the statutes declare such marriage void, or it is deemed contrary to the laws of nature as generally recognized in Christian countries.

THE MARRIAGE OF A MINOR SON, whether with or without his father's consent, so far emancipates him that the father is no longer entitled to his wages, if necessary for the support of the son's wife.

COMPLAINT under the statute against the defendant for non-support of his wife. He was at the time the complaint was filed twenty years of age, and he married in the state of Maine about one year previously without the consent of his father. The father was in necessitous circumstances and had demanded and collected the wages of his son. The defendant asked the court to rule that as he had married without his father's consent, the latter was entitled to his wages, and therefore that if the father had claimed and demanded them, and thus deprived the defendant of the means of supporting his wife, there could be no conviction, and that a marriage in another state in violation of the laws of this state will not here emancipate the minor party to such marriage. The judge refused to so rule, and, on the contrary, instructed the jury that the father could only claim such part of the son's wages as were not needed for the support of his wife, and that it was for the jury to say whether the defendant had any income, and if so, whether his neglect to support his wife was, upon the evidence, unreasonable. Verdict of guilty to which the defendant excepted.

J. Cummings and R. G. Fairbanks, for the defendant.

C. N. Harris, for the commonwealth.

FIELD, C. J. The exceptions recite that the "defendant was nineteen at the time of his marriage, and twenty when the complaint was made." The age of the wife nowhere

appears, but it was not contended that she was under the age of consent. If the marriage had been solemnized within the commonwealth, it would have been valid: Pub. Stats., c. 145, sec. 6; *Parton v. Hervey*, 1 Gray, 119. It is not contended that the marriage was void by the laws of Maine, but we cannot take judicial notice of the statutes of Maine, and the common law of that state must be presumed, in the absence of evidence, to be the same as the common law of Massachusetts: See *Hiram v. Pierce*, 45 Me. 367; 71 Am. Dec. 555.

Section 10, chapter 145, of the Public Statutes, was intended to define the cases in which a marriage should be deemed void which was solemnized in another state by persons resident in this commonwealth, who went into the other state for the purpose of having the marriage solemnized there, and afterwards returned to and resided in this commonwealth, but the present case is not within this section. The general rule of law is, that a marriage contracted elsewhere, if valid where it is contracted, is valid here, although the parties intended to evade our laws, unless the statutes declare such a marriage void, or the marriage is one deemed "contrary to the law of nature as generally recognized in Christian countries": *Sutton v. Warren*, 10 Met. 451; *Commonwealth v. Hunt*, 4 Cush. 49; *Commonwealth v. Lane*, 118 Mass. 458; 18 Am. Rep. 509.

The consequences of this marriage must be the same as if it had been solemnized in this commonwealth, and the presiding justice therefore correctly ruled that this marriage "imposed upon the defendant all the duties and responsibilities of the marital relation." The real question is whether when a minor son marries without the consent of his father, and the father never consents to it, and needs the son's wages for his support and the support of his family, the father is entitled to the son's wages during minority in preference to the wife, who also needs the wages for her support. The ruling was, that the "wife would be entitled to receive support from" her husband, and that he "would be entitled as of right to such portion of his wages as to enable him to support his wife; that the father could only claim the rest."

It seems to be settled that the marriage of a minor son, with the consent of his father, works an emancipation, and it is not clear that the marriage of a minor son without his father's consent does not have the same effect, although the

decision in *White v. Henry*, 24 Me. 531, is *contra*. It has been said: "The husband becomes the head of a new family. His new relations to his wife and children create obligations and duties which require him to be the master of himself, his time, his labor, earnings, and conduct": *Sherburne v. Hartland*, 37 Vt. 528, 529. There seems to be little doubt that when an infant daughter marries, she is emancipated from the control of her parents: *Aldrich v. Bennett*, 63 N. H. 415; 56 Am. Rep. 529; *Burr v. Wilson*, 18 Tex. 367; *Porch v. Fries*, 18 N. J. Eq. 204; *Northfield v. Brookfield*, 50 Vt. 62; *Rex v. Wilmington*, 5 Barn. & Adol. 525; *Rex v. Everton*, 1 East, 526. See, however, *Babin v. Le Blanc*, 12 La. Ann. 367. The meaning of emancipation is not that all the disabilities of infancy are removed, but that the infant is freed from parental control, and has a right to his own earnings. In *Taunton v. Plymouth*, 15 Mass. 203, 204, it was intimated that the marriage of an infant son with the consent of the father entitled the son to his own earnings for the support of his family, and in *Davis v. Caldwell*, 12 Cush. 512, it was said that an infant husband is liable for necessities furnished for himself and his family. It is clear, we think, that it is the duty of an infant husband to support his wife, and that, if he have property and a guardian, it is the duty of the guardian to apply the income, and, so far as is necessary, the principal of his ward's property, to the maintenance of the ward and his family, under the Public Statutes, c. 139, sec. 80.

We are of opinion that these considerations make it necessary to hold that an infant husband is entitled to his own wages, so far as they are necessary for his own support and that of his wife and children, even if he married without his father's consent, and that the ruling of the court was sufficiently favorable to the defendant. Whether sound policy does not require that in every case in which the marriage is valid an infant husband should be entitled to all his earnings, need not now be decided.

Exceptions overruled.

EVIDENCE — PRESUMPTION AS TO LAW OF OTHER STATES. — The laws of another state will be presumed to be the same as the laws of this state: *Hill v. Wilber*, 41 Ga. 449; 5 Am. Rep. 540; *Peterson v. Chemical Bank*, 32 N. Y. 21; 83 Am. Dec. 298; *Brimhall v. Van Campen*, 8 Minn. 13; 82 Am. Dec. 118, and note; *Beane v. Schnecko*, 100 Mo. 250; and the common law will be presumed to prevail: *Carpenter v. Grand Trunk R'y Co.*, 72 Me. 333; 30 Am. Rep. 340, and note; *Hills v. Maxon*, 19 Mich. 186; 2 Am. Rep. 81; AM. ST. REP., VOL. XXXIV. — 17

Conner v. Trawick, 37 Ala. 289; 79 Am. Dec. 58, and note; *Thompson v. Menous*, 2 Cal. 99; 56 Am. Dec. 318, and note.

MARRIAGE AND DIVORCE—VALIDITY OF FOREIGN MARRIAGE.—A marriage valid by the laws of the place where made, must be treated as valid everywhere: *Johnson v. Johnson*, 30 Mo. 72; 77 Am. Dec. 598, and note; *Hiram v. Pierce*, 45 Me. 367; 71 Am. Dec. 555, and note; *State v. Patterson*, 2 Ired. 346; 38 Am. Dec. 699; *Harding v. Alden*, 9 Greenl. 140; 23 Am. Dec. 549; *Fornhill v. Murray*, 1 Bland, 479; 18 Am. Dec. 344, and note; *Kobogum v. Jackson Iron Co.*, 76 Mich. 498. The exceptions to the foregoing rule are: 1. Marriages which are deemed contrary to the law of nature, as generally recognized in Christian countries; 2. Marriages which the local lawmaking power has either expressly or by necessary implication declared shall not be allowed any validity: *Pennegar v. State*, 87 Tenn. 244; 10 Am. St. Rep. 648, and note; *True v. Ranney*, 21 N. H. 52; 53 Am. Dec. 164, and note; extended note to *Greenhow v. James*, 56 Am. Rep. 607.

INFANTS—MARRIAGE.—Whether the marriage of a male infant so far emancipates him from the control of his parents as to entitle him to retain his earnings is discussed in the extended note to *Craig v. Van Babber*, 18 Am. St. Rep. 638.

DOHERTY v. O'CALLAGHAN.

[157 MASSACHUSETTS, 90.]

JURY TRIAL—PROBATE PRACTICE.—Whether issues shall be framed for submission to a jury on the hearing of an appeal in probate rests in the discretion of the presiding judge, and the exercise of such discretion cannot be reviewed upon appeal where, upon the record, the appellate court has no means of determining whether or not the judge's refusal to frame and submit issues was right or wrong.

EVIDENCE—PRIVILEGED COMMUNICATIONS TO ATTORNEY.—AFTER A TESTATOR'S DEATH and when his will is presented for probate, his attorney, who had drawn it, should be allowed to testify as to the directions given him by the testator, so that it may appear whether the instrument presented for probate is or is not the will of the alleged testator.

C. F. Donnelly and A. E. Gage, for the appellants.

W. I. Badger, for the appellee.

LATHROP, J. This is an appeal from a decree of a justice of this court, affirming a decree of the judge of probate for the county of Suffolk, admitting to probate the will of one Patrick Grealy. The reasons of appeal filed in the probate court were, that, at the time of the execution of the instrument offered for probate, the said Grealy did not know the contents thereof; that he was then not of sound and disposing mind and memory; and that the instrument was procured by fraud and undue influence of two persons named.

1. Before the case was heard the appellants moved that

issues be framed for a jury, but did not state what issues were desired. This motion was denied, and an appeal was taken to this court. We assume, for the purposes of the case, that the appellants desired issues in accordance with their reasons of appeal.

It is provided by the Public Statutes, chapter 156, section 19, that "if, upon the hearing of an appeal in the supreme court of probate, a question of fact occurs proper for trial by jury, the court may cause it to be so tried upon an issue framed for the purpose under the direction of the court." We agree that the general practice of this court has been, and remains, to frame the customary issues, but the discretion asserted in *Davis v. Davis*, 123 Mass. 590, 593, remains so far a reality that, if the court is satisfied that injustice would be done by framing them, and that special reasons exist for declining to frame them and for proceeding to try the case at once, it has the right to adopt that course. The exercise of this discretion may be reviewed by this court on appeal; but in the case at bar we have no means of determining that the justice who declined to frame issues was wrong: *Fay v. Vanderford*, 154 Mass. 498.

2. Thomas J. Gargan, Esq., an attorney at law, was permitted to testify, against the objection and exception of the appellants, in regard to what was said to him by Grealy, when the latter came to see him for the purpose of having his will drawn. This conversation included the directions given by Grealy as to the disposition of his property. The appellants contend that these communications were privileged, and therefore inadmissible.

The only case which they have brought to our attention bearing upon this point, is *Loder v. Whelpley*, 111 N. Y. 239, 248, where it is said: "A lawyer, in receiving the directions or instructions of one intending to make a will, is confided in by reason of his professional character as a counsellor, and he acts in that capacity, although asking no questions and without advising, he does nothing more than to reduce these directions to writing." And the opinion was expressed that, under the New York code (sec. 835), which provides that, "an attorney or counsellor at law shall not be allowed to disclose a communication, made by his client to him, or his advice given thereon, in the course of his professional employment," what was said at certain interviews with the testatrix could not be testified to by the attorney. This opinion was, however, to

some extent, *obiter dictum*, as it was held that the contestant was not prejudiced by the admission of the evidence, on the ground that, leaving out the testimony of the attorney, the judgment below must be affirmed on the other evidence in the case.

The question before us, however, is not what construction is to be given to the language of a code, but what is the rule at common law, and the further question whether the case at bar comes within the rule.

The general rule undoubtedly is that an attorney shall not be called upon or allowed to disclose matters communicated to him by his client in professional confidence: *Foster v. Hall*, 12 Pick. 89, 93; 22 Am. Dec. 400. See also page 98, where several exceptions to the rule are stated. The reason for the rule is well stated by Lord Brougham, in *Greenough v. Gaskell*, 1 Mylne & K. 98, 103, where he says: "It is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources; deprived of all professional assistance, a man would not venture to consult any skillful person, or would only dare to tell his counsellor half his case."

In *Russell v. Jackson*, 9 Hare, 387, Vice-Chancellor Turner considered the question at length, and held that the reason of the rule did not apply to testamentary dispositions, unless the testator entertained an illegal purpose; and that the existence of such a purpose would not attach any privilege to the communication.

In regard to this last suggestion, it has recently been held in England, after full consideration, that communications made to a solicitor by a client before the commission of a crime, for the purpose of being guided or helped in the commission of it, are not privileged from disclosure: *The Queen v. Cox*, 14 Q. B. Div. 153. It has also been held that communications to a solicitor for the purpose of committing a fraud are not privileged: *In re Postlethwaite*, 35 Ch. Div. 722.

In this commonwealth, although the question has not been passed upon by the full court, we believe the practice has been to admit such evidence as was allowed in the case at bar. In *Worthington v. Klemm*, 144 Mass. 167, the only evidence that the testatrix had knowledge of the contents of the

will was the testimony of the lawyer who drafted it as to what instructions he had received from his client, and to his compliance with such instructions, the will not having been read to the testatrix or by her before she signed it. This appears from the papers in the case, although not distinctly from the report of it. See also *Davis v. Davis*, 123 Mass. 590, 595.

Undoubtedly while the testator lives, the attorney drawing his will would not be allowed, without the consent of the testator, to testify to communications made to him concerning it, or to the contents of the will itself; but after his death, and when the will is presented for probate, we see no reason why, as a matter of public policy, the attorney should not be allowed to testify as to directions given to him by the testator, so that it may appear whether the instrument presented for probate is or is not the will of the alleged testator. The reasoning of Vice-Chancellor Turner appears to us to be sound; and we are of opinion that the case does not fall within the reason of the rule relating to privileged communications. We need not, therefore, consider whether the case might rest on the ground that an intent to waive the privilege might be inferred from the will, as was held in *Blackburn v. Crawford*, 3 Wall. 175. We are of opinion that the testimony of Mr. Gargan was properly admitted.

3. The remaining question is one of fact. We have examined the voluminous testimony submitted to us. It would serve no useful purpose to discuss it. It is enough to say that we agree with the result arrived at by the justice who heard the case.

Decree affirmed.

ATTORNEY AND CLIENT—PRIVILEGED COMMUNICATIONS.—To entitle a party to the protection accorded to privileged communications, they must be made to an attorney acting in the character of legal adviser, and for the purpose of obtaining professional advice or aid: *Caldwell v. Davis*, 10 Col. 481; 3 Am. St. Rep. 599; *House v. House*, 61 Mich. 69; 1 Am. St. Rep. 570, and note; extended note to *Bacon v. Frisbie*, 36 Am. Rep. 631; notes to *Bank v. Mercereau*, 49 Am. Dec. 233; *Coveney v. Tannahill*, 87 Am. Dec. 296; *Commonwealth v. Merriam*, 25 Am. Dec. 420. Where an attorney prepares an order for the defendant to sign, which the defendant subsequently swears that he did not sign, such attorney is a competent witness to prove its execution by the defendant: *Rahm v. State*, 30 Tex. App. 310; 28 Am. St. Rep. 911. An attorney employed to draw up a deed may testify as to what came to his knowledge during the transaction: *De Wolf v. Strader*, 26 Ill. 225; 79 Am. Dec. 371, and note. *Contra*: *Bank v. Mercereau*, 3 Barb. Ch. 528; 49 Am. Dec. 189, and note; see *Johnson v. Davenport*, 19 Johns. 134; 10 Am. Dec. 198.

LUFKIN v. ZANE.

[157 MASSACHUSETTS, 117.]

NUISANCE — LIABILITY OF GRANTEE OF PREMISES FOR. — A grantee of premises on which a nuisance is maintained is not liable if he merely suffers it to remain, unless he is first asked to abate it, nor then, unless he has power to abate it.

NUISANCE — LIABILITY OF THE GRANTEE OF LEASED PREMISES FOR. — He who purchases premises with a nuisance on them maintained by a tenant, is not answerable for the continuance of the nuisance when it does not appear that he had any control of the tenant or of the use of the premises made by him, and even if the landlord had power to enter and expel the tenant, he is not bound to do so for the benefit of the party injured by the nuisance.

NUISANCE — LANDLORD AND TENANT. — If a tenant creates a nuisance without the authority of the landlord, the latter is not liable.

NUISANCE — LANDLORD AND TENANT. — If premises were so used as to constitute a nuisance when they are let, yet if it was reasonably practicable to use them for the purpose for which they were let without creating or continuing the nuisance, then it cannot be said that the landlord by letting them authorized the creation or continuance of the nuisance, and therefore, he is not liable if the tenant continues to so use them as to create or continue a nuisance.

NUISANCE — LANDLORD AND TENANT. — A landlord is not liable for an act done by a tenant without his knowledge or consent and which was not authorized by the lease.

ACTION for injuries to plaintiff's estate. Verdict for the plaintiff.

C. W. Bartlett and C. W. Clark, for the defendant.

S. J. Elder and W. C. Wait, for the plaintiff.

FIELD, C. J. So far as the injury to the plaintiff's estate was caused by keeping horses in the stalls in the basement of the stable, the exceptions recite "that the basement stalls were built and the holes bored by a tenant, Richardson, about March, 1889, without his [the defendant's] knowledge or consent." The defendant let the stable to Barnard on October 18, 1886, to hold for a term from November 1, 1887, to January 1, 1897. Barnard, with the consent of the defendant, let it to Richardson on February 1, 1888, to hold for a term of eight years and eleven months from February 1, 1888. Barnard assigned this lease to the defendant on June 18, 1889. This lease contained covenants that the lessee should do all needful inside repairs, and should not make any unlawful, improper, or offensive use of the premises, nor any alterations or additions during the term, without the consent of the lessor, and that he should be "responsible, and will

pay all damages and charges to the city government or others for any nuisance made or suffered on the premises during said term." There were no stalls in the basement when this lease was executed, and the basement had not previously been used for keeping horses.

So far as the injury to the plaintiff's estate was caused by the overflow of the two tanks under the floor in the rear of the basement, the principal facts appear to be as follows: The stalls on the first and second floors in the front of the stable were connected with a cesspool in the front of the basement, and this connected with the sewer in Chardon Street. No complaint was made by the plaintiff of this part of the premises. In the rear of the stable there were stalls on the first and second floors, and "gutters ran along behind the stalls in the rear half of the stable into iron pipes at the rear, which emptied directly into two vats or closed tanks under the floor in the rear of the basement." These tanks had no outlet, and it was necessary to bail them out and empty the contents into the cesspool in front. The tanks were about two and a half to three feet wide, and about three feet deep, and held about two barrels, possibly a little more, and as they were used, it was necessary to bail them, according to one witness, once a week, according to others, twice a week, and one witness testified that they were liable to fill up in a day if the gutters were cleaned out. There was evidence that the tanks were in good condition. A large part of the plaintiff's damages must have come from the overflow of these tanks, and from the basement stalls, from which the urine ran through holes in the basement floor into the earth.

The plaintiff bought his estate on January 1, 1883, and the defendant bought his of Oliver W. Peabody on January 31, 1884. The defendant's premises when he bought them were under a lease from Peabody to one Winship for the term of three years from November 1, 1881, and the lease contained a provision that in case of a sale of the premises by the lessor during the term, the lessee should quit and deliver up to the lessor the entire premises, after having received notice from him to do so, within one, two, or three months from the date of said notice. The premises were subject also to another lease by Peabody to Winship, dated October 1, 1883, for the term of three years from November 1, 1884. Both these leases contained covenants on the part of the lessee to make all needful inside repairs, and not to make or suffer to be

made any alteration therein without consent of the lessor. It does not appear that the last-mentioned lease contained any provision that the lessor might determine it if he sold the premises. Both leases contained a provision that the lessor might enter to view the premises and make improvements, and to expel the lessee if he should fail to pay the rent and taxes, or should make or suffer any strip or waste, and they were assigned by Peabody to the defendant when he purchased the property. Winship, under these leases, remained in possession until Barnard took possession under the lease given him by the defendant. The premises had been used for a stable for many years, and the tanks, and the stalls for horses on the first and second floors, and the gutters and their connections with the tanks, were in the stable when the defendant purchased it.

It thus appears that the defendant bought the premises subject to two leases to the same tenant, for terms which continued to November 1, 1887, and that he could not determine the leases so long as the lessee performed his covenants. If the lessor could have determined them at the time of the sale, this had not been done, and no right was given to the purchaser to determine them, if the lessee did not make or suffer any strip or waste.

The exceptions recite that "the judge instructed the jury fully in regard to the liability of defendant's grantor as a landowner in a manner not objected to by the defendant, and continued as follows: 'Now, what was the liability of the defendant before he made the lease to Barnard, and while he held the land subject to the Peabody leases? I instruct you, as matter of law, that when he succeeded to the rights of Peabody he became liable, and assumed the responsibilities of Peabody; that is to say, if at the time Peabody let those premises to Winship the premises were then not fit for a stable, and both parties contemplated that they were to be used for that purpose, and Peabody himself would have been liable under the rules I have stated as to the liability of Zane after 1887, then Zane becomes liable before 1887, exactly as Peabody was.'" The defendant's counsel had previously asked a ruling that, "if the defendant was liable at all, he could not be held liable for any damage that might have been occasioned by the condition of the defendant's premises during the time the same were occupied by said Winship under the said leases from Peabody to him," which ruling was refused.

In this case the stable was not a nuisance in itself. It was the use made of it which constituted the nuisance, if there were one. The rule that any person injured by a continuing nuisance can maintain an action against the landowner who created it, or against a grantee who continues it, is subject to the provision that the grantee, if he merely suffers it to remain, must first be asked to abate it, and this implies that he must have the power to abate it. *Prentiss v. Wood*, 132 Mass. 486. A lessee is a grantee within the meaning of this rule: *McDonough v. Gilman*, 3 Allen, 264; 80 Am. Dec. 72. It was said in *Rex v. Pedley*, 1 Ad. & E. 822, 827: "If a nuisance be created, and a man purchase the premises with the nuisance upon them, though there be a demise for a term at the time of the purchase, so that the purchaser has no opportunity of removing the nuisance, yet by purchasing the reversion he makes himself liable for the nuisance." But this seems inconsistent with the opinion written by the court of the exchequer chamber in *Gandy v. Jubber*, 9 Best & S. 15, and the statement has been often doubted or denied. The subject has been elaborately considered in *Ahern v. Steele*, 115 N. Y. 203, 12 Am. St. Rep. 778. See also *Saltonstall v. Banker*, 8 Gray, 195; *Dalay v. Savage*, 145 Mass. 38; 1 Am. St. Rep. 429; *Clifford v. Atlantic Cotton Mills*, 146 Mass. 47; 4 Am. St. Rep. 279; *McCarthy v. York County Sav. Bank*, 74 Me. 315; 43 Am. Rep. 591.

We do not see how the defendant can be held liable for the use made of the premises by Winship under the leases from Peabody, as the defendant, so far as appears, had no control over Winship, or over the use made of the premises by him, unless he made or suffered strip or waste, and even if the defendant had the power to enter and expel the lessee, the defendant was not bound to do this for the benefit of the plaintiff. We think that the true rule is suggested in *Dalay v. Savage*, 145 Mass. 38, 1 Am. St. Rep. 429, which is, that if the nuisance is created by a tenant or by a former owner who has let the premises to a tenant, a grantee subject to the tenancy in consequence of the purchase and the subsequent receipt of rent is not made liable to third persons for the use which the tenant continues to make of the premises, even if it constitutes a nuisance. When a landlord lets premises with a nuisance upon them, the case is somewhat different. If the condition of the premises of itself is such as to constitute a nuisance, it has been held that by the letting the landlord

authorizes the continuance of the nuisance. If the premises are a nuisance not in themselves, but in consequence of the use made of them by the tenant, then the question is whether this use is authorized by the landlord. If the premises can be used by the tenant in the manner intended by the landlord, either as shown by the construction of the premises, or by the terms of the lease, or by other evidence, without becoming a nuisance, the landlord is not liable for the acts or neglect of the tenant which creates the nuisance. If the tenant creates the nuisance without authority of the landlord, and after he has entered into occupation as tenant, the landlord is not liable. Applying these principles to the evidence, we are of opinion that the ruling asked for which we have quoted should have been given.

After Winship ceased to occupy the premises and the defendant let them to Barnard, the question is whether the defendant let them with a nuisance upon them, or let them to be used in such a manner as would create a nuisance. As we read the evidence, the nuisance resulted largely, if not wholly, from the negligence or the unauthorized acts of the tenant. If it was reasonably practicable to use the premises for a stable in the manner in which the landlord intended they should be used without creating a nuisance, then it cannot be said that by letting them the landlord authorized the creation or the continuance of a nuisance. On the conflicting evidence in the case as to the sufficiency of the size of the tanks to hold the urine which would drain into them from the number of horses which could properly be kept in the stable as it was constructed when it was let, it may possibly have been a question for the jury whether, by the exercise of reasonable care, the tenant could have prevented the overflowing of the tanks; but the evidence is not sufficiently full on this point to enable us to decide this. The defendant is not liable for the result of stabling horses in the basement by the tenant without his knowledge or consent, as this was a use which, so far as appears, the tenant was not authorized by the landlord to make. On the ground that the defendant was entitled to the specific ruling which we have quoted, and that it does not appear that the presiding justice gave any instructions equivalent to it, the exceptions must be sustained. The questions concerning evidence may not arise in another trial, and we do not consider them.

Exceptions sustained.

NUISANCE — LIABILITY OF GRANTOR OF PREMISES. — The grantor of premises upon which there is a nuisance is not responsible therefor until he has notice thereof, and in some cases not until he has been required to abate it: *Ahern v. Steele*, 115 N. Y. 203; 12 Am. St. Rep. 778, and note; *Groff v. Ankenbrandt*, 124 Ill. 51; 7 Am. St. Rep. 342, and note with cases collected; but the purchaser of a reversionary interest in land upon which a nuisance exists, and of which he has full knowledge, and who thereafter receives the rents from the tenant in possession, is liable for the damages arising from such nuisance subsequent to his purchase: *Pierce v. German Sax etc. Society*, 72 Cal. 180; 1 Am. St. Rep. 45, and note.

LANDLORD AND TENANT — LIABILITY OF LESSOR FOR NUISANCE ON PREMISES. — A lessee will be liable, separately or jointly with the lessor, to one injured by falling into a coal hole in the sidewalk, where it was maintained by him for the benefit of the leased premises: *Irvine v. Wood*, 51 N. Y. 234; 10 Am. Rep. 603. The lessee will be liable for injuries caused by a defective scuttle in the sidewalk if it was in good condition when possession was given under the lease: *Fisher v. Thirkell*, 21 Mich. 1; 4 Am. Rep. 422. A tenant who, during his term, erected an insecure fence on the premises, may be liable to a passer-by injured by it after he has surrendered possession to the landlord: *Hussey v. Ryan*, 64 Md. 426; 54 Am. Rep. 772. See *Byre v. Jordan*, 111 Mo. 424; 33 Am. St. Rep. 543, and note with the cases collected. The mere accepting of premises does not render a tenant liable for a nuisance thereon; it must be shown that he had notice of its existence: *Timlin v. Standard Oil Co.*, 126 N. Y. 514; 22 Am. St. Rep. 845.

LANDLORD AND TENANT — LANDLORD'S LIABILITY FOR NUISANCE ON PREMISES. — One who leases premises knowing, or who could by the exercise of reasonable care have ascertained, the existence of a dangerous nuisance thereon, will be liable in damages to one injured thereby: *Timlin v. Standard Oil Co.*, 126 N. Y. 514; 22 Am. St. Rep. 845, and note; *Wunder v. McLean*, 134 Pa. St. 334; 19 Am. St. Rep. 702, and note; *Ahern v. Steele*, 115 N. Y. 203; 12 Am. St. Rep. 778, and note; *Ingersoll v. Rankin*, 47 N. J. L. 18; 54 Am. Rep. 109. A landlord is not liable for a nuisance carried on on the premises demised by him, if he did not have any reason to believe that the premises would be so used as to be injurious to the plaintiff: *Fish v. Dodge*, 4 Denio, 311; 47 Am. Dec. 254, and note. See extended notes to *Leonard v. Storer*, 15 Am. Rep. 78, and *Clancy v. Byrne*, 15 Am. Rep. 393.

HASTY v. SEARS.

[157 MASSACHUSETTS, 123.]

MASTER AND SERVANT. — WHEN ONE PERSON LENDS HIS SERVANT TO ANOTHER for a particular employment, such servant, for anything done in that employment, must be dealt with as a servant of the person to whom he was lent, although he remains the general servant of the person who lent him.

MASTER AND SERVANT — FELLOW SERVANTS. — If a servant is lent by his master to another person, and is injured by the negligence of a servant of the latter, he is regarded as being injured by a fellow servant, and cannot recover for such injury.

ACTION to recover for personal injuries received by plaintiff from an elevator in the defendant's building. The trial court directed a verdict for the defendant.

H. H. Smith, for the plaintiff.

J. Lowell, Jr., and S. H. Smith, for the defendant.

BARKER, J. The plaintiff cannot recover if he was a fellow servant with the boy who negligently lowered the elevator car upon him while he was at work in the elevator well upon a stepladder standing on the bottom of the well. The plaintiff was a carpenter, employed by the hour by the firm of C. A. Noyes and Company. They told him that there was some work to be done at the defendant's building, and that the superintendent of the building would tell him what was to be done. He went to the building, and the superintendent instructed him what work was to be done, namely, that the framework of the elevator door wanted fixing, and that the door needed loosening at the top. To do this work it was necessary to stand on a ladder or steps in the elevator well and to take the door off. The elevator was in operation, and the superintendent, in the presence and hearing of the plaintiff, gave orders to the elevator boy not to run the car below the second story until he was notified that the plaintiff had finished his work and had left the well. The boy, when the orders were given, said that he understood them, and that he would not run the car below the second story. The plaintiff then began his work, standing on the step ladder, and while he was ascending it in order to take out the door which needed repairs, the boy ran the car down below the second story so that it struck and injured the plaintiff.

It is obvious that C. A. Noyes and Company were not contractors. The transaction between them and the defendant was the loan by them to the defendant of their servant, the plaintiff, who was to be under the control of the defendant by his superintendent while engaged in the work. This made the plaintiff *pro hac vice* a servant of the defendant. The principle is thus stated by Cockburn, C. J., in *Rourke v. White Moss Colliery Co.*, 2 C. P. Div. 205, 209: "But when one person lends his servant to another for a particular employment, the servant, for anything done in that particular employment, must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who

lent him." The plaintiff was not acting under the immediate orders of his general masters, C. A. Noyes and Company, but was acting under the orders of the defendant's superintendent, and thus became the defendant's servant, notwithstanding that he remained the general servant of Noyes and Company, and was paid by them: *Purnell v. Great Western R'y*, 1 Q. B. Div. 636, as stated by Mellish, L. J., in *Rourke v. White Moss Colliery Co.*, 2 C. P. Div. 205, 210.

The same doctrine has been laid down by this court in cases in which one has been held liable for injuries caused by the negligence of a person in the general employment of a third person, but at the time engaged in the defendant's business: *Forsyth v. Hooper*, 11 Allen, 419; *Kimball v. Cushman*, 103 Mass. 194, 198; 4 Am. Rep. 528; *Clapp v. Kemp*, 122 Mass. 481; *Linnehan v. Rollins*, 137 Mass. 123; 50 Am. Rep. 287; and also in cases in which, as in the present, the question is whether the person injured and the person whose negligence caused the injury were fellow servants: *Johnson v. Boston*, 118 Mass. 114, 117; *Killea v. Faxon*, 125 Mass. 485; *Ward v. New England Fibre Co.*, 154 Mass. 419, and cases cited.

The plaintiff and the elevator boy were both servants of the defendant at the time of the plaintiff's injury, and as their employment was a common employment, the negligence of the boy in running the car down upon the plaintiff was an obvious risk, which the plaintiff assumed, and for which the defendant is not answerable to him. The plaintiff and the boy were both working to secure the successful operation of the elevator, the plaintiff in repairing it, and the boy in operating the car, and they were forwarding a common enterprise for the benefit of the defendant, and were in a common employment: *Johnson v. Boston Towboat Co.*, 135 Mass. 209; 46 Am. Rep. 458; *McGee v. Boston Cordage Co.*, 139 Mass. 445, 448; *Clifford v. Old Colony R. R. Co.*, 141 Mass. 564.

The case thus comes clearly within the principle that when a man enters into an employment in the carrying on of which others are engaged with him, he tacitly agrees to accept all the ordinary risks attending it. The plaintiff must have known that there was a risk that the elevator boy would be careless, and forget his orders not to lower the car below the second story, and that while he was himself at work in the well below, he would be liable to injury from such negligence: *Rourke v. White Moss Colliery Co.*, 1 C. P. Div. 556, 559.

Judgment on the verdict.

MASTER AND SERVANT — WHEN THE RELATION EXISTS. — When a master has hired his servant to another, giving the latter the complete control and direction of him, with power to discharge him, the original master is not liable for his negligence, although he receives pay for the work done by him: *Brown v. Smith*, 86 Ga. 274; 22 Am. St. Rep. 456, and extended note discussing this subject. A railroad by accepting the services of a gate-man of another railroad, makes him for the time being its servant, for whose negligence it is responsible: *Cleveland etc. R'y Co. v. Schneider*, 45 Ohio St. 678. One is liable for the acts of a servant lent to him to perform a special service: *Powell v. Construction Co.*, 88 Tenn. 692; 17 Am. St. Rep. 925.

COMMONWEALTH v. HOLMES.

[157 MASSACHUSETTS, 233.]

CRIMINAL LAW — EVIDENCE OF PREVIOUS ACTS AND THREATS. — On the trial of an indictment against a husband for the murder of his wife, in which there is no direct evidence that he inflicted the injuries resulting in her death, it is proper to admit evidence of threats and acts of violence on his part towards her from shortly after their marriage, some nine years prior to her death, down, or nearly down, to the time of the alleged homicide. Such evidence is admissible because it tends to prove settled ill-will and malice towards the wife, and the existence of a motive on the part of the husband for the commission of the crime with which he is charged.

CRIMINAL LAW — GRAND JUROR'S BIAS. — An indictment for murder will not be quashed because the grand jury knew of the cause of the death, and did not fully and sufficiently describe it, when such indictment consists of two counts, the first of which charges the accused with killing the deceased by striking, beating, and kicking her with his hands and feet, and by casting and throwing her down, unto, and upon the floor and ground, and the second of which avers that the accused made an assault upon the decedent, and by some means, instruments, and weapons, to the jurors unknown, deprived her of her life, if there is nothing to show what evidence was before the grand jury when they found such indictment.

CRIMINAL LAW. — ON A TRIAL FOR MURDER, EVIDENCE that there was sand in the mouth, nostrils, and windpipe of the decedent, when her body was first seen after her death, is admissible, at least for the purpose of disclosing the condition of the body when found.

PROSECUTION of the defendant for the murder of his wife. The indictment, so far as it attempts to state the means employed in producing her death, sufficiently appears in the second point of the *syllabus*. Among the evidence received at the trial, notwithstanding the defendant's objections and exceptions, was the testimony of various witnesses, the substance of which was, that the defendant and the decedent were married in 1882; that soon afterwards he commenced to ill-treat

her; that he at different times threatened her life, chased her with deadly weapons, struck, choked, and kicked her, dragged her off a bed by the hair of her head; that after these acts they separated for about fifteen months, after which they again lived together, and that after their reunion he again on divers occasions threatened her life, and was guilty of acts of violence towards her. She began suit for her separate maintenance in August, 1891. Soon after that time he declared that she would never live to get such maintenance. She disappeared September 1, 1891, and her body, on the 3d of November following, was found buried in a cellar. Evidence was also received, against defendant's objections, to the effect that sand and dust were found in the windpipe, mouth, and nostrils of the decedent's body when found after her death. At the close of the evidence the defendant moved to quash the indictment, on the ground that when it was found, the grand jury knew of the probable cause of the death, and he had been brought to trial without being fully and formally informed of the charge against him. The motion was denied.

The defendant asked for the following instructions: "1. Upon the evidence the jury must be satisfied beyond a reasonable doubt that Nellie F. Holmes was killed by a kick, blow, or in other ways, as set out in the first count of the indictment, or they must return a verdict of not guilty; 2. The jury, upon the evidence, must return a verdict of not guilty; 3. There is a variance between the allegations of the second count and the evidence, and for that reason the jury must return a verdict of not guilty."

These instructions were refused and the following given: "The proof must conform to the allegations. If all the material allegations in either of the two counts are proved beyond a reasonable doubt, there must be a verdict of guilty. If all the allegations upon the one count, or upon the other, that are material to some crime set out in the indictment are not established beyond a reasonable doubt, there must be a verdict of not guilty. In the second count one of the allegations is that the way and manner, the means, instrument, and weapon, by which the deceased was deprived of life, were to the grand jurors unknown. That is a material allegation. It is an allegation as to which it has been repeatedly held there need not be any affirmative evidence introduced; if nothing appears with reference to the question whether the grand jury

knew or did not know the way and manner, means, instrument, or weapon, that was the effective cause of the death of the deceased, the allegation of ignorance in the indictment itself would be sufficient. But when there is evidence bearing upon that question, whether the grand jury knew or did not know, the burden is upon the government to establish beyond a reasonable doubt that the grand jury did not know the way and manner, or the means, instrument, or weapon, by which the deceased was deprived of life. . . . This is a question of fact for you to determine upon the evidence, whether the allegation in that count is sustained by the evidence before you, that the grand jury did not know. You are to keep in mind that the test is not what the grand jury might have known by proper effort, but what they did in fact know. So far as the means of information shown to have been before them helps you to determine what they did in fact know, so far it can be considered. But the test is, did the grand jury in fact know in what way and manner, by what means, instrument, or weapon, Nellie F. Holmes was deprived of life. If you are satisfied upon the evidence, beyond a reasonable doubt, that they did not know, then the second count of this indictment is sufficient to sustain conviction, if its other allegations are also established.

“In the first count there is the allegation of the use of a great variety of means in perpetrating the crime. To sustain a conviction under that count, or to prove the allegations of that count, it is not necessary to prove that all the means set out in that count were in fact used, or were in fact effective in causing death. It is sufficient that it be proved that death resulted from some one of them, or any of them combined. After what has been said upon the allegation of ignorance in the second count, it cannot be very material whether the government sustains this charge as it is set out in the first count or as set out in the second count. If the jury should be in doubt upon the allegation in the second count, then there could be a conviction only in case the government has proved the allegation in the first count. But if you are satisfied, upon the evidence, that at the time when the indictment was found the grand jury did not know which of the means caused the death, then it would be quite immaterial whether the government succeed in making it certain that death followed in the manner set out in the first count, or as set out in the second count.”

Verdict of guilty of murder in the first degree. The defendant alleged exceptions.

A. L. Green and M. F. Druce, for the defendant.

A. E. Pillsbury, attorney-general, for the commonwealth.

MORTON, J. The only exception which has been argued to us is that relating to the admissibility of evidence introduced by the government as to threats and acts of violence on the part of the defendant towards his wife, from shortly after their marriage down, or nearly down to the time of the alleged homicide. The evidence tended to show that these acts and threats occurred with more or less frequency during all that time, with the exception of about fifteen months in 1888 and 1889, when they were separated, and of a few months, though just how many did not appear, after they lived together again. We think that the evidence was clearly admissible in connection with the other circumstances. It tended to show a settled ill-will and malice on the part of the defendant towards his wife, and therefore bore directly on the question whether there was any motive for him to commit the crime. It was not admitted for the purpose of showing separate and independent acts and threats, but for the purpose of showing a course of conduct. It was unavoidable that, in showing the cause of the defendant's conduct, evidence of his acts and threats should be introduced. His course of conduct could not be shown so satisfactorily in any other way: *Commonwealth v. Goodwin*, 14 Gray, 55; *Commonwealth v. Madan*, 102 Mass. 1; *Commonwealth v. Bradford*, 126 Mass. 42; *Commonwealth v. Abbott*, 130 Mass. 472; *Commonwealth v. Ryan*, 134 Mass. 223; *Commonwealth v. Quinn*, 150 Mass. 401; *State v. Rash*, 12 Ired. 382; 55 Am. Dec. 420; *Cluck v. State*, 40 Ind. 263, 270; *Mimms v. State*, 16 Ohio St. 221; *Sharp v. People*, 29 Ill. 464; *Thrasher v. State*, 3 Tex. App. 281.

The question of the remoteness of the acts and threats was for the court in the exercise of its discretion, and we see nothing to indicate that the discretion was exercised erroneously: *Commonwealth v. Goodwin*, 14 Gray, 55; *Commonwealth v. Bradford*, 126 Mass. 42; *Commonwealth v. Abbott*, 130 Mass. 472; *Commonwealth v. Ryan*, 134 Mass. 223, and *Commonwealth v. Quinn*, 150 Mass. 401. The separation of fifteen months would tend to indicate, if anything, a continuance of ill feeling on the defendant's part towards his wife, and there is nothing to show on what terms they began to live together

again. Even if there had been a reconciliation, that followed as it was by a resumption by the defendant of his threats and acts of violence, would not render evidence of former acts and threats inadmissible: *Robbins v. Robbins*, 100 Mass. 150, 97 Am. Dec. 91, and these taken in connection with the subsequent acts and threats tended to show a substantially continuous course of such conduct.

The motion to quash on the ground that the grand jury knew of the cause of death, and that the indictment did not fully, formally, and sufficiently describe it, was rightly denied. In addition to *Commonwealth v. Webster*, 5 Cush. 295, 52 Am. Dec. 711, the latter question has been recently considered in *Commonwealth v. Coy*, 157 Mass. 200.

There was no evidence as to what appeared before the grand jury, and the instructions of the court as to the averment in the second count in the indictment, that the defendant killed his wife in a manner and by means to the grand jurors unknown, were on that account sufficiently favorable to him.

It does not appear for what purpose the evidence as to the presence of sand in the mouth, nostrils, and windpipe was admitted, or what use was made of it. It might have been admitted properly for either one of several reasons. It is enough to say that its admission may be justified, as describing the condition of the body when found: *Commonwealth v. Brown*, 14 Gray, 419, 431.

Exceptions overruled. —

HOMICIDE. — EVIDENCE OF PREVIOUS ACTS AND THREATS: See *Garner v. State*, 28 Fla. 113; 29 Am. St. Rep. 232, and note with the cases collected; also *Palmer v. People*, 138 Ill. 356; 32 Am. St. Rep. 146, and note.

HOMICIDE — INDICTMENT. — AVERMENT AS TO MANNER AND MEANS OF KILLING: See *Palmer v. People*, 138 Ill. 356; 32 Am. St. Rep. 146, and note; also *Schafer v. State*, 22 Neb. 557; 3 Am. St. Rep. 274, and extended note thoroughly discussing the sufficiency of indictments for homicide.

PATNODE v. WARREN COTTON MILLS.

[157 MASSACHUSETTS, 283.]

MASTER AND SERVANT. — IF A BOY EMPLOYED IN A MANUFACTORY is called from his work by another employee styled a "second hand," and commanded to assist him in a dangerous employment, such boy cannot be regarded as entering upon such employment improperly, even although he would have been justified in disobeying the command of the second hand.

MASTER AND SERVANT — MINOR AND INEXPERIENCED EMPLOYEE. — Though a servant incurred, without necessity, an obvious danger from which he suffered injury, it cannot be said, as a matter of law, that he is not entitled to recover if there is evidence tending to show that he was only fourteen years of age, rather dull of comprehension, that while he worked in view of the dangerous machinery for three weeks, yet he had not before worked with it, and that it was no part of his duty to so work, but that he had been commanded with an oath by one in apparent authority over him to enter upon the dangerous employment, and might have been confused thereby, and no attempt was made to explain to him the dangers to which he was exposed. Under such circumstances the jury should be left to determine whether he was in the exercise of due care when injured.

MASTER AND SERVANT — VICE PRINCIPAL, DELEGATION OF AUTHORITY OR. If an overseer of a manufactory knowingly acquiesces in the giving of orders to workmen by another person there employed, this is equivalent to conferring authority upon such person to give such orders, and justifies employees in obeying them when given, though he acted negligently in giving them, or did not make a wise selection of the person whom he called to do certain work, or did what neither the master nor the overseer intended.

NEGLIGENCE — INJURIES INCREASED BY THE ACT OF FELLOW SERVANTS. — If a servant is caught in dangerous machinery under such circumstances that his master is answerable, and another servant, hearing his cry of distress, and for the purpose of relieving him, does another act in so careless a manner as to inflict further injury, the master is also responsible for that.

ACTION for injuries suffered by the plaintiff while in the service of the defendant. The nature of these injuries and the circumstances under which they were inflicted are stated in the opinion of the court. The instructions of the court in reference to the relation of James McKeon to the parties were as follows: "I do not know that there is any evidence in the case that the overseer did by words appoint James McKeon second hand, or by words clothe him with any authority other than that of an ordinary servant or laborer. The second way in which James McKeon might get his authority would be from being allowed to exercise it in the mill, and in the presence and with the knowledge of the overseer. I assume, for the purposes of this case, and believe it to be the law, that

upon such a matter the overseer had the power, according to the evidence, without dispute to clothe James McKeon with this authority, if he distinctly and specifically desired to do so, by appointment. He would also have power to invest him with authority indirectly; that is, by allowing him to exercise it, knowing that he exercised it and making no objection. Upon such a matter as that, by virtue of his position, he would represent the defendant corporation, and, under the law, they might clothe him with authority by allowing him to use it with their knowledge without objection from themselves or from the overseer representing them. . . . Bearing in mind that the burden of proof is upon the plaintiff, taking all the evidence of the plaintiff, has the plaintiff satisfied you by a fair weight of the evidence that James McKeon at and before the time of this injury was in the exercise of this power and control over the plaintiff and other servants, and that it was known and acquiesced in by the overseer? If he was, then you would be warranted in finding that he had this authority with reference to calling upon the boy. . . . If James McKeon had the right, by virtue of the business he was set to do, to call men to his assistance, and in the honest prosecution of the work that had been assigned him, and with an honest intention to carry it out, called upon plaintiff to assist him, although he had not judged wisely in doing so, although he may not have done exactly what the defendant intended him to do, yet if he was acting in good faith, intending to carry out and perform a duty which had been assigned him, and he did what he did in the honest exercise of his judgment, and so called upon the plaintiff, and the plaintiff, in obedience to that call, went to his assistance, it must be taken for the purposes of this case that the defendant would be responsible for that call. . . . If his authority is shown by a fair weight of evidence in either of these two ways I have spoken of, and if the plaintiff went to that machine in response to his call, then it is to be taken at this point that the plaintiff was properly at the machine, and unless you are satisfied of James McKeon's authority in one of these two ways to which I have referred, and that the plaintiff went in response to his call, then the defendant is not responsible to the plaintiff for his being at the lap machine, and it is not responsible for the injury that he suffered." With respect of the liability of the defendant for any additional injury resulting from the act of plaintiff's

fellow servant after his hand had been caught, the court gave the jury this instruction: "There has been some evidence tending to show that after this boy's hand got caught and got injured to some extent, the machine was stopped, and then that a fellow laborer, hearing the outcry, did something to the machine, which, instead of stopping it, started it up again, and the boy's hand was drawn farther in and injured further. Now, the question is, what responsibility would the defendant have with reference to that? If the defendant is liable at all, my view of that is this: that if what this servant did he did in the way of prosecuting his work as a servant, however careless it might be, it would be the carelessness of a fellow servant, and the defendant would not be responsible for it. If, on the contrary, what he did he did because he heard this cry of distress, and not with reference to his ordinary labors as a servant, but for the purpose of relieving the plaintiff, whom he supposed was being hurt, and did it with that intention and for that purpose, although his action was a careless action, as it turned out, I think the defendant may be responsible for that, if the defendant is responsible in the case."

C. L. Gardner, for the defendant.

G. M. Stearns and J. H. Loomis, for the plaintiff.

BARKER, J. The plaintiff seeks, at common law, to recover for an injury received while in the defendant's employ. His hand was crushed between the rolls of a lap winder then in use for doubling laps. The machine had a long platform about two and a half feet wide, on which ran a layer of carded cotton of about the same width, passing between two iron rolls into a box at the end of the machine. The rolls were about six inches in diameter and two and a half feet in length, set closely together, one above the other, making thirty or forty revolutions per minute, and the under roll was covered, except at each end, by the lap passing between them. When used for doubling, a second lap, so wound as to form a cylinder a foot and a half in diameter and weighing some thirty pounds, was placed in slotted standards rising from each side of the platform at some distance from the rolls, and the end of this lap carried down on the side farther from the rolls to the other lap, and its end joined to that lap, so that the two would pass together along the platform and between the rolls. The height of the platform above the floor, and of the stan-

dards above the platform, and the space between the standards and the rolls, were in dispute.

At the time of the injury the plaintiff was fourteen years of age, and at the time of the trial, nineteen. He was himself a witness. There was some evidence, which read in the bill of exceptions seems slight, but the weight of which, it having been admitted, was for the jury (see *Ciriack v. Merchants' Woolen Co.*, 151 Mass. 152; 21 Am. St. Rep. 438; *Leisritz v. American Zylonite Co.*, 154 Mass. 382, 384, and *Connors v. Grilley*, 155 Mass. 575), that he was not very smart, and was rather dull. He had never worked in a mill before his employment by the defendant, which was about three weeks before his injury, and before his employment he knew nothing of such work. He was not hired to work upon the lap winder, but it was in his sight when at his work. The evidence tended to show that he was hired to mind the cards, mend broken ends, keep the cards clean, and the floor clean around four sections; and that he was told by the overseer to attend to that work, and not to attend to any other. There was no dispute that he received sufficient instructions as to the work which he was hired to do. He himself testified that the lap winder was at the end of the cards, and that he noticed it when he was at work upon the cards, and how it operated, and what it did, and knew about the laps running along and running between the rolls, and that the end of the lap which was put into the standards would roll down until it came in contact with the one on the platform, and that they then went together between the rolls.

In the room were an overseer, a second hand, and some twenty employees. Among the latter were two card grinders, James McKeon, and another who was away on the day of the injury. One employee attended to the lap winder, when used for its ordinary purposes; but, when used to double laps, James McKeon testified that it was his duty to get the second lap in place. To do this required assistance. He testified that he had been in the habit of calling the lap-winder man to help him, and, if he did not come, the other card grinder, if he was there; and, if he did not find the card grinder, somebody else. That he had to double laps once or twice a week, and could not tell how many different persons he had called on to help him do that work; but he did not know that he had called on anyone but the lap-winder man and the card grinder, and he had always called on a man before.

The overseer, however, testified that it was the business of the two card grinders to put the laps on when they were to be doubled, and that he instructed them to do so; and that, in the absence of one of the two, the other would generally take the man that ran the lap winder, who was supposed to help when no one else could be got; and, upon cross-examination, the overseer further testified that, if James McKeon found the tender of the lap winder gone, he would have to call on somebody else to help with the doubling. The overseer also testified that a card grinder keeps the cards in repair, and has no one under him, but has his own work to do; but the treasurer of the mill testified, "We consider a grinder a little better than a common hand."

The circumstances attending the injury were in dispute, and the evidence was conflicting. It was in dispute whether James McKeon, who called the plaintiff to come to the lap winder and help, was then the second hand of the room or was merely a card-grinder, and so a common laborer. The plaintiff testified that the lap broke, and that James McKeon told him to piece it up, and that while he was doing so his hand was caught; while McKeon testified that there was no breaking of the lap, and no order to piece it up. The plaintiff testified that James McKeon gave him no instructions; while McKeon testified that, when the plaintiff put the lap down in the standard, he told him, "Now keep away from the rolls, keep your hands away from those rolls." It was contended in behalf of the plaintiff, that, when he held the lap in his left hand, it came between his eye and the rolls, so that he could not see the rolls. The exceptions show no direct testimony to this effect, nor to the contrary, and whether the jury so found must have depended upon the inferences of fact which they may or may not have drawn from the evidence. It cannot be said, as matter of law, that the contention was not correct. In addition, as before stated, the height of the platform and of the standards, and the distance of the latter from the rolls, were in dispute. After the plaintiff's hand was caught, the machine was promptly stopped by James McKeon; but before the hand was released, it was again started by the lap-winder man; and the defendant contended that the injury was thus aggravated. Whether the machine was so started in the prosecution of work, or with a mistaken purpose of rescuing the plaintiff, was in question.

The evidence tended to show that James McKeon was doubling laps, and that, the other card grinder being absent, he called the tender of the lap winder to help him in putting a lap in the standards. This man not coming, McKeon called the plaintiff to come over and help him. The plaintiff was at work at the cards and did not comply. McKeon called him a second time, and he remained at his own work; McKeon then, with an oath, called him a third time; whereupon the plaintiff left his work and went to help McKeon. McKeon, standing with the rolled lap on one side of the lap winder, and the plaintiff opposite on the other side, passed to him one end of the rolled lap, directing him to put the end of a stick passing through it into the slot in the standard, and the plaintiff did so. The plaintiff testified that, after the lap had been so placed, he saw it run off, and that then McKeon passed him another lap, and that his end of this lap fell and broke, and that McKeon directed him to piece it, in attempting to do which his hand was caught by the rolls. McKeon testified that he remembered the placing of but one lap with the plaintiff's help, and, as above stated, denied that the lap fell or broke, and that he ordered the plaintiff to piece it.

1. It is plain that a verdict for the defendant could not have been ordered on the ground that the plaintiff was improperly at the lap winder. There was evidence for the jury that James McKeon, whose orders to help at the work on that machine the plaintiff obeyed, was the second hand of the room, and that therefore the plaintiff was under his authority. Even although the plaintiff would have been justified in refusing to obey the order if McKeon was second hand, and so in authority, the plaintiff might submit to McKeon's direction; and, if so, it would not be open for the defendant to say that he was not properly at work. The weight of the evidence may have been strongly in favor of the conclusion that James McKeon was not second hand, but it was a question for the jury.

2. Whether a verdict for the defendant ought to have been ordered on the ground that the plaintiff, in placing his hand in a position to be caught between the rolls, incurred without necessity a known and obvious danger, which he must be held to have had the means and capacity of appreciating, and so was injured by his own carelessness, is a difficult question. Persons of his age and of ordinary understanding, who have for three weeks been familiar with the operation of such

machinery as that upon which the plaintiff was employed, must be taken to know that the hand will be injured if allowed to come between revolving wheels, such as the plaintiff had seen in operation upon the lap winder, and by which he was hurt: *Henry v. King Philip Mills*, 155 Mass. 361; *De Souza v. Stafford Mills*, 155 Mass. 476; *Rood v. Lawrence Mfg. Co.*, 155 Mass. 590, and cases cited. The defendant contends that numerous cases in which a similar doctrine has been applied by this court govern the case at bar. In *Moulton v. Gage*, 138 Mass. 390, the dangers were of a different class, but the fact that they were obvious was held to authorize a verdict for the defendant, the plaintiff being a man of the age of twenty-five years, and of ordinary physical and mental capacity. In *Crowley v. Pacific Mills*, 148 Mass. 228, the plaintiff was about seventeen years old, and had been employed in mills for five years, and it was held that he could not recover for an injury sustained in consequence of putting his finger between a roll and a cylinder, each of which was revolving, the roll serving to hold against the cylinder a piece of cloth, from which he was smoothing a wrinkle. In *Probert v. Phipps*, 149 Mass. 258, the plaintiff was a boy of fifteen, as to whose capacity the case is silent. He was hurt only twenty-one days after he began to work. But it appeared that he had worked for over a year in the business of making fireworks, in which he had to be very careful, and that his father was a machinist employed in machine works where he had visited him, and that on these visits he had kept away from revolving wheels, because afraid he might get caught if he went too near. He was injured by the catching of his clothing in a rapidly moving gearing, of whose position and nature he was well aware; and the ordering of the verdict against him was held right, because it appeared from his own testimony "that the danger of getting caught in the gearing was obvious, and that he well understood what this danger was, and how it was to be avoided." In *Coullard v. Tecumseh Mills*, 151 Mass. 85, the plaintiff was over fifteen years of age, and of ordinary intelligence, had been at work for several months on machinery of various kinds, and for two and a half days on the picker by which he was hurt. He knew all the elements of danger, and also how to avoid them, and for these reasons the defendant's exceptions were sustained. In *Pratt v. Prouty*, 153 Mass. 833, the plaintiff was about sixteen years old, and of at least ordinary intelligence, and had been warned that, if he got his fin-

gers between the two slowly revolving cylinders of a skiving machine, he would get hurt, and he knew that if he put his fingers where the leather went they would be caught; and for these reasons there was no evidence to warrant the verdict which the jury returned in his favor. In *Tinkham v. Sawyer*, 153 Mass. 485, the plaintiff was over sixteen years of age, and at least of ordinary intelligence; had been attending wool cards for a month, and for parts of two days the wool picker, by falling into which he was injured. He had been repeatedly told that the picker was dangerous, and not to touch it while in motion. He testified that he knew it was dangerous when in motion, and he had helped to clean it a number of times. On these facts, the court held that a verdict for the defendants was rightly ordered. In *Leistritz v. American Zylonite Co.*, 154 Mass. 382, the plaintiff was eighteen years old, of such apparent intelligence that the question whether he was above or below the average intelligence of a boy of his age was properly excluded, had been at work in the mill some eight months, and was injured by placing his hand between revolving rollers which were entirely open to observation, and which he testified he knew would draw in his fingers.

In all these cases, it appeared, without contradiction, that the danger was not only obvious, but actually known to the person injured, who in each case was conceded to be of at least ordinary intelligence, and was in fact of greater age and more experience than the plaintiff in the case at bar. Besides these considerations, there was, in the present case, the possibility that it was fairly to be inferred from the evidence that the lap itself concealed from the plaintiff's vision the rolls by which he was hurt, at a stage of his work almost immediately preceding the injury, and that the final order which he obeyed was accompanied by an oath which may have had a tendency to confuse him. In this state of the evidence, we are of opinion that the presiding justice was justified in leaving to the jury the question whether the plaintiff was in the exercise of due care. The same state of the evidence made it competent for the jury to find a want of due care on the part of the defendant in putting the plaintiff to do the work in which he was engaged without warning of the danger and without instruction how to avoid it. The same considerations dispose of the fourth and fifth rulings requested by the defendant; for if the jury should find that the plaintiff

was at the lap winder in obedience to an order for which the defendant was responsible, and that by reason of apparent youth, inexperience, or dullness he was in need of warning and instruction, and was not warned or instructed, this would be negligence on the part of the defendant: *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; 8 Am. Rep. 506; *Sullivan v. India Mfg. Co.*, 113 Mass. 896, 899; *Rock v. Indian Orchard Mills*, 142 Mass. 522, 529; *Ciriack v. Merchants' Woolen Co.*, 146 Mass. 182, 190; 4 Am. St. Rep. 807, and 151 Mass. 152; 21 Am. St. Rep. 438; *Crowley v. Pacific Mills*, 148 Mass. 228; *Probert v. Phipps*, 149 Mass. 258.

3. The defendant requested three rulings upon the question whether the plaintiff was at the lap winder under such circumstances as to render the defendant liable for an injury resulting therefrom. Of these, the third could not be properly given, because, as we have seen, there was evidence that James McKeon was second hand, and in authority over the plaintiff. The presiding justice was not bound to give the first and second in terms, and if the instructions on this branch of the case were sufficient and correct, the exceptions relating to it must be overruled. The instructions were certainly sufficiently full, covering all the aspects of the evidence, and we are of opinion that they were correct.

For some purposes the overseer of the room was the representative of the defendant, and could in that room confer authority both directly and indirectly. If he knowingly acquiesced in the giving of orders by James McKeon to other workmen, that was tantamount to conferring upon him authority so to do; and so would be his imposing upon James McKeon of work which it was impossible for him to do without help, and allowing him to obtain assistance as he chose. James McKeon was doing the defendant's work in the ordinary manner, and in good faith took an obvious and natural means of forwarding the master's work in calling the plaintiff to help him. If the plaintiff complied with the order, the defendant would stand to him in the relation of a master, although James McKeon might have acted negligently in calling upon him, and might not have made a wise selection, or have done what the overseer or the defendant intended. The usual doctrines of agency would govern the case, and the jury were properly so instructed.

The instructions with reference to the starting of the ma-

chine after the plaintiff's hand was caught were sufficiently favorable to the defendant.

Exceptions overruled.

MASTER AND SERVANT—ORDERING MINOR SERVANT INTO POSITION OF DANGER.—Two cases similar to the leading one are *Orman v. Mannix*, 17 Col. 564, 31 Am. St. Rep. 340, and *Brazil etc. Coal Co. v. Gaffney*, 119 Ind. 455, 12 Am. St. Rep. 422, in which it was held that where a foreman, who has the direction of the men in an establishment, orders a boy fourteen or fifteen years of age to do a dangerous thing outside of the duties and employment of the boy, and in the attempt to obey such order the boy is injured, the master is liable; and the fact that the boy might have disobeyed the order will not release such liability. See the notes to the above cases, also extended note to *Shortel v. St. Joseph*, 24 Am. St. Rep. 322. When a superior servant orders one under him to perform work different from that for which he is employed, which results in injury, the master is liable: *Harrison v. Detroit etc. R. R. Co.*, 79 Mich. 409; 19 Am. St. Rep. 180, and note.

MASTER AND SERVANT—VICE PRINCIPAL—DELEGATION OF AUTHORITY BY.—The abandonment of his duties by a vice principal, and a transfer thereof by him to an incompetent person, leaves the master liable: *McEligott v. Randolph*, 61 Conn. 157; 29 Am. St. Rep. 181, and note; *Tyson v. North etc. Alabama R. R. Co.*, 61 Ala. 554; 32 Am. Rep. 8. A mine owner is liable for the negligence of a mining captain having entire management of the mine, though the appointment was made by an agent of the owner, and not by the owner himself: *Ryan v. Bagaley*, 50 Mich. 179; 45 Am. Rep. 35.

MASTER AND SERVANT—MASTER'S LIABILITY TO SERVANT INJURED THROUGH NEGLIGENCE OF MASTER AND COSERVANT.—The negligence of a fellow servant does not relieve a master from liability to a coservant for injury which would not have happened had the master done his duty: *Coppins v. New York etc. R. R. Co.*, 122 N. Y. 557; 19 Am. St. Rep. 523; *Johnson v. First Nat. Bank*, 79 Wis. 414; 24 Am. St. Rep. 722, and note; *Myers v. Hudson Iron Co.*, 150 Mass. 125; 15 Am. St. Rep. 176, and note. If the negligence of a master combines with the negligence of a fellow servant to the injury of another servant, himself free from negligence, the master is liable: *Franklin v. Winona etc. R. R. Co.*, 37 Minn. 409; 5 Am. St. Rep. 853, and note; *Faren v. Sellers*, 39 La. Ann. 1011; 4 Am. St. Rep. 256; *Flet v. Central Pac. R. R. Co.*, 72 Cal. 38; 1 Am. St. Rep. 22, and note.

ALTON v. FIRST NATIONAL BANK.

[157 MASSACHUSETTS, 841.]

MISTAKE OF LAW, RECOVERY OF MONEYS PAID UNDER. — One who indorses a writing, believing it to be a negotiable instrument, to a person who receives it under the same belief, and who afterwards pays the latter the amount called for by such writing, cannot recover the amount so paid on the ground that it was paid under a mistake of law, in which all the parties participated, to the effect that the writing was a negotiable instrument on which the indorser was liable, when it was not such instrument, and no enforceable liability ever existed thereon.

ACTION for money had and received. The plaintiff and William Walker indorsed to defendant a number of writings of the same general tenor, and which both they and the defendant believed to be negotiable instruments. One of such writings was as follows: “\$150. So. Woodstock, Ct., March 4, 1889. Received of W. H. Walker, this day, one bay horse, Vinton horse, one express wagon, for which I promise to pay said Walker or order one hundred and fifty dollars, five months from date, at First Nat. Bank, Webster, with interest at per cent. Said property to be and remain the entire and absolute property of said Walker until paid in full by me. And I hereby agree not to sell or dispose of, and to keep said property in good order and condition, as the same now is. And should said horse die before said sum is fully paid, I hereby agree to pay all sums due thereon. And should said property be returned to or taken back by said Walker, I agree that all payments made thereon may be retained by said Walker for the use of said property. Charles H. Moore. Witness, L. L. Edmunds.” The plaintiff had no interest in the writings, but indorsed them for the benefit of Walker, to enable him to obtain money of the defendant. He subsequently disappeared, and the plaintiff, believing himself to be liable on the writings, paid the greater portion thereof to defendant, but, being afterwards informed that they were not negotiable instruments, and that he was not liable thereon, he commenced this action to recover the amount of his payments.

W. S. B. Hopkins and F. B. Smith, for the plaintiff.

F. P. Goulding, for the defendant.

HOLMES, J. Lord Westbury sometimes is supposed to have taken a distinction as to the effect of a mistake of law according to whether the mistaken principle is general or special: *Cooper v. Phibbs*, L. R. 2 H. L. 149, 170. But in the often-

quoted passage of his judgment he only meant that certain words, such as "ownership," "marriage," "settlement," etc., import both a conclusion of law and facts justifying it, so that, when asserted without explanation of what the facts relied on are, they assert the existence of facts sufficient to justify the conclusion, and a mistake induced by such an assertion is a mistake of fact. In the case before him the mistake was one concerning the ownership of a fishery, and was induced by a general statement of a certain person that he owned it: *L. R. 2 H. L. 164*; *Windram v. French*, 151 Mass. 547, 551.

We will assume, merely for the purposes of this case, without expressing any opinion upon it either way, that a mistake of law of any kind, when the mistaken notion is made the avowed basis of a transaction, may be a ground of relief under some circumstances. We take it that the money sought to be recovered was understood by the plaintiff and the defendant to be paid and received under the belief that the plaintiff was bound to pay it by his indorsement of the instrument set out in the agreed facts, and we also will assume that this belief was erroneous, as has been decided in Connecticut: *First Nat. Bank v. Alton*, 60 Conn. 402. See *Sloan v. McCarty*, 134 Mass. 245.

But the plaintiff meant to bind himself in the way in which he supposed he had done, and must be taken to have known that the defendant meant to have the security of his obligation before advancing, as it did, on the strength of it. If the case stopped there, the plaintiff hardly would have the boldness to contend that he could recover back what he had paid, and what he had meant to be understood and had been understood to promise, simply because, if he had found out the law soon enough, he might have backed out of his undertaking, and of what he was bound in honor to do. The plaintiff says that the case does not stop there, because, if the parties had been right in their view of the law, the plaintiff would have had the benefit of the security mentioned in the instrument, whereas now he has not.

If it be true that the plaintiff was not subrogated to the security upon payment, we are of opinion that it makes no difference as between the plaintiff and the defendant. The right of a surety to subrogation, like his right to contribution, is a collateral matter, and no part of his principal contract by which he makes himself surety. The existence of that right is not the implied foundation of the principal contract. The

defendant was not concerned or bound to inquire what the expectations of the plaintiff might be as against a third person. It was for the plaintiff to obtain or preserve his rights as best he might: *Aiken v. Short*, 1 Hurl. & N. 210, 215.

So far as this case is concerned it does not matter whether the mistake was a mistake of fact or one of law. For even a common mistake as to a fact, but for the supposed existence of which the plaintiff would not have come into the transaction, as the defendant knew, would not warrant a recovery, when, as here, the fact was a matter equally open for the inquiry and judgment of both parties, and the defendant had a right to assume that the plaintiff relied wholly on his own means of information: *Hecht v. Batcheller*, 147 Mass. 335; 9 Am. St. Rep. 708; *Carter v. Boehm*, 8 Burr. 1905, 1910; *Smith v. Hughes*, L. R. 6 Q. B. 597.

There is no ground, however, for the suggestion that this was a mistake of fact in such a sense as to help the plaintiff. The plaintiff's indorsement was in the hands of the accommodated party until delivered in Massachusetts, and the payment was made in Massachusetts, so that the transaction was a Massachusetts transaction throughout. The plaintiff's obligation to know the Massachusetts law, whatever the measure of that obligation may be, was not affected by the accident of his being personally out of the jurisdiction: See *Hill v. Chase*, 143 Mass. 129. Probably the measure of the plaintiff's obligation would be the same in the case of a contract made in Connecticut, if, on any ground, its validity or effect depended on the law of Massachusetts: *Cambioso v. Maffett*, 2 Wash. C. C. 98, 104; *Merchants' Bank v. Spalding*, 9 N. Y. 53, 62; *Graves v. Johnson*, 156 Mass. 211; 32 Am. St. Rep. 446.

Judgment for defendant affirmed.

MISTAKE OF LAW. — RECOVERY OF MONEY PAID UNDER: See extended note to *Black v. Ward*, 15 Am. Rep. 171; also note to *Laurence v. Beaubien*, 23 Am. Dec. 164. No recovery can be had of money paid on account of a mistake of law: *Painter v. Polk County*, 81 Iowa, 242; 25 Am. St. Rep. 489, and note with cases collected; *McWhinney v. Logansport*, 132 Ind. 90, but in *McMurtry v. Kentucky etc. R. R. Co.*, 84 Ky. 462, it was held that where one pays money under a mistake of law, without consideration, and not as the result of a compromise, which was not owing in law, nor in conscience, he may recover it back.

REYER v. ODD FELLOWS' FRATERNAL ACCIDENT ASSOCIATION.

[157 MASSACHUSETTS, 267.]

JURISDICTION — FOREIGN CORPORATIONS. — Whether a corporation can be sued in a state of which it is not a resident depends upon the position in which it has seen fit to place itself in reference to that state in connection with the laws thereof.

JURISDICTION — FOREIGN CORPORATIONS. — A statute providing that any person who shall receive or transmit moneys for the use of a corporation organized in another state, or who shall make or cause to be made, any contract or transact any business for or on account of such corporation, shall be deemed an agent thereof, and service of process against the corporation may be made on such agent, is valid; and a judgment against a corporation based upon the service of such process, on such agent, in an action to recover upon a contract made by him, in such state with a citizen thereof, is valid and enforceable in the state where the corporation was organized and of which it is a resident.

C. W. Clark, for the plaintiff.

H. W. Ely and C. F. Ely, for the defendant.

BARKER, J. The defendant corporation is organized under the Public Statutes, chapter 115, with authority to transact the business of accident insurance. The plaintiff is the beneficiary in a policy dated December 11, 1888, and issued to one George Reyer of Indianapolis, Indiana, then the plaintiff's husband, who was killed accidentally on June 18, 1889. The first count is on a judgment recovered on the policy in the superior court of Marion County, Indiana, on December 20, 1889, and the second on the policy itself. The court below directed a verdict for the plaintiff upon the first, and a verdict for the defendant upon the second count. Both parties filed bills of exceptions.

If the plaintiff is entitled to a verdict upon the first count, she cannot recover upon the second; and her exceptions, relating only to the case made upon that count, may be properly overruled as immaterial. The defendant's exception to the ruling that the plaintiff could recover upon the first count must also be overruled, if, upon the uncontroverted admissible evidence produced at the trial, the Indiana judgment was valid, and if no material evidence bearing upon that point was excluded.

The defendant is a Massachusetts corporation, and thus foreign to the state of Indiana. Whether it could be there sued depends upon the position which it has seen fit to place

itself in with reference to that sovereignty, in connection with the laws of Indiana; and, if liable to be there sued, whether it was so served with process as to give the Indiana court jurisdiction, also depends upon the acts of the corporation and the statutes of that state. These were all facts upon which the defendant was not concluded by the record of the Indiana court: *Carleton v. Bickford*, 13 Gray, 591; 74 Am. Dec. 652; *Gilman v. Gilman*, 126 Mass. 26; 80 Am. Rep. 646; *Wright v. Andrews*, 130 Mass. 149; *Gibson v. Manufacturers' Ins. Co.*, 144 Mass. 81; and yet, if, upon the uncontroverted admissible evidence the Indiana court had jurisdiction, and if no material evidence was excluded, the ruling that the plaintiff could recover in this action upon the first count was right.

Certain statutes of Indiana in force when the policy was issued, and when the Indiana suit was commenced, were in evidence, and not controverted, so that their effect was for the court alone: *Kline v. Baker*, 99 Mass. 253; *Ely v. James*, 123 Mass. 36; *Gibson v. Manufacturers' Ins. Co.*, 144 Mass. 81. They are thus stated in the bill of exceptions: —

“The plaintiff also put in evidence the statutes of Indiana in force at the time of making the contract on which said judgment was rendered, and at the time of commencement of said suit in Indianapolis, by which it was proved that said superior court of Indiana should have jurisdiction of all civil causes of such a nature as the cause for which said action was brought in said court, and that said court should be a court of record. Said statutes also contained the following provisions:—

“ ‘The process against either a domestic or foreign corporation may be served on the president, presiding officer, mayor, chairman of the board of trustees, or other chief officer (or if its chief officer is not found in the county, then upon its cashier, treasurer, secretary, clerk, general or special agent); or if it is a municipal corporation, upon its marshal; or if it is an incorporated library company, upon its librarian; if none of the aforesaid officers can be found, then upon any person authorized to transact business in the name of such corporation.’

“ ‘When a corporation, company, or an individual has an office or agency in any county for the transaction of business, any action growing out of or connected with the business of such office may be brought in the county where the office or agency is located, at the option of the plaintiff, as though the

principal resided therein; and service upon any agent or clerk employed in the office or agency shall be sufficient service upon the principal; or process may be sent to any county, and served upon the principal.'

"Said statute also provided that it should be unlawful for any corporation organized under the laws of any other state than the state of Indiana to make any insurance or to transact any business in the state of Indiana, until such corporation shall file with the auditor of the state of Indiana a written consent that service of process in any suit against the company may be served upon any authorized agent of such company in the state of Indiana, and that if there should be no authorized agent of such company in the county where any suit shall be brought, service may be made upon the auditor of the state of Indiana with such effect as that made upon an authorized agent of such company.

"Said statute also contained the following provision relating to foreign corporations: 'Any person who shall, directly or indirectly, receive or transmit money or other valuable thing to or for the use of such corporations, or who shall in any manner make, or cause to be made, any contract, or transact any business for or on account of any such foreign corporation, shall be deemed an agent of such corporation.'" The bill discloses no other evidence as to the law of Indiana.

It also appeared that the policy sued on in the Indiana action was delivered in Indiana to a citizen of that state, in pursuance of an application made in Indiana by the insured member; and that other like transactions had been similarly entered into between the defendant and other persons in Indiana; that the defendant was in the habit of forwarding notices of assessments upon its Indiana members, with the request to pay the same to one Reynolds, in Indianapolis, whom it designated as local secretary in that state, and of receiving from him remittances of sums paid to him by members in Indiana upon such assessments, less his commission, as well as of transmitting through him communications relating to proofs of death; and that he rendered accounts to the defendant every third month upon blanks which it furnished, and that it acknowledged to him the receipt of the moneys which he remitted to it at the home office in Massachusetts; and that he had an office for the transaction of the defendant's business in the county where the suit was brought. It is therefore safe to say that it appeared, without dispute,

that the defendant, before and at the time when the Indiana suit was brought, was there engaged in the business of insurance; and that in the transaction of that business, Reynolds (whether "local secretary" or "local state secretary" or not, and whether an officer known to the defendant's by-laws or not) did in fact transmit money to the defendant for its use, as well as transact some other business on its account; and that he maintained an office for that purpose. This state of facts would not have been at all materially varied, either by the exclusion of the evidence, the admission of which was excepted to by the defendant, or by the admission of that offered and excluded. The first of these exceptions was to the second, third, and fourth interrogatories to the deponent Reynolds, in answer to which he testified that he was the defendant's local secretary for Indiana, and recited the circumstances of his engagement as such by one Hanchett, representing himself as the traveling agent of the defendant. We see no objection to the admissibility of this testimony, inasmuch as there was independent evidence that Reynolds was recognized by the defendant's officers as its local secretary in Indiana, and that Hanchett's other acts in behalf of the defendant in Indiana were ratified by it, by issuing policies to members upon applications there procured by him. But, if this evidence had been excluded, there still remained sufficient competent evidence to show that under the Indiana statutes Reynolds was in such a relation to the defendant, as its agent, as to make the service of process against it upon him a valid service upon the defendant. The defendant also excepted to the exclusion of evidence that the defendant never had by virtue of any vote any such officer as a local secretary. If this evidence had been admitted, and had been believed by the jury, the result could only have been to show that the service upon Reynolds, who under the statute quoted was to be deemed the defendant's agent, was that prescribed under such circumstances by the Indiana statute. The offer to show, by the defendant's secretary, that no officer of the defendant, and no one in its home office, had written such a letter as the one which Reynolds testified that he received from the defendant, asking him to act as its agent for Indiana, and which he had mislaid or lost, might well have been excluded on the ground that such testimony could not be within the personal knowledge of the witness; but, if admitted, the evidence would have had no tendency to contradict or disprove the facts which con-

stituted Reynolds an agent under the Indiana statute. The by-laws of the defendant, which it offered for the purpose of proving that Reynolds was not its authorized agent, and which were excluded, are not stated in the bill of exceptions. But, aside from this, it is evident that its by-laws could not affect the *status* which Reynolds acquired by virtue of his acts in behalf of the defendant, in connection with the statute declaring that a person so acting should be deemed an agent of the corporation.

It is unnecessary to decide whether the fact that the defendant presumed to do business in Indiana while these statutes were in force raises a presumption that it had filed with the auditor of that state a written consent that process against it might be served upon any authorized agent in the state: See *Lafayette Ins. Co. v. French*, 18 How. 404; *Railroad Co. v. Harris*, 12 Wall. 65, 81; *Railway Co. v. Whitton*, 18 Wall. 270, 285; *Ex parte Schollenberger*, 96 U. S. 369, 376; or whether the declaration of the defendant's counsel in court, that it had filed no such consent, had any tendency to prove that fact in its favor. For it is plain upon an examination of the statutes in evidence, that it was the law of Indiana that any foreign corporation doing business there should be liable to be sued in its courts, and that in such suits effective service of process against it might be made by serving the same upon any agent or any person authorized to transact business in its name in the state. Under the statute last quoted, Reynolds, on whom the process against the defendant was in fact served, was clearly its agent. Whether he was a local secretary also, as the process was in fact served upon him, and as there was no claim or proof that there was any other person in that state holding any superior office in the corporation, was wholly immaterial. The same considerations show that the officer's return was sufficient.

It therefore sufficiently appeared that the defendant was so served with process as to give the court of Indiana jurisdiction, unless it was beyond the power of the legislature of Indiana to enact the statutes quoted. Of this power there can be no question. Corporations are not entitled, under article 4, section 2, of the Constitution of the United States, "to all privileges and immunities of citizens in the several states." Any state may, within limitations not material to the present case, prescribe the terms and conditions on which foreign corporations may act therein; and this power

undoubtedly allows the state to prescribe the mode of service of process of its courts upon a foreign corporation doing business there: *Lafayette Ins. Co. v. French*, 18 How. 404; *Paul v. Virginia*, 8 Wall. 168; *Doyle v. Continental Ins. Co.*, 94 U. S. 535; *Ex parte Schollenberger*, 96 U. S. 369; *Railroad Co. v. Kootz*, 104 U. S. 5, 11; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; *Philadelphia Fire Ass'n v. New York*, 119 U. S. 110; *Attorney-general v. Bay State Min. Co.*, 99 Mass. 148; 96 Am. Dec. 717; *National Bank of Commerce v. Huntington*, 129 Mass. 444, 449; *Johnston v. Trade Ins. Co.*, 182 Mass. 432; *Wilson v. Martin-Wilson Automatic Fire Alarm Co.*, 149 Mass. 24. Such statutes have often been declared to be neither unreasonable in themselves, nor in conflict with any principle of public law, and their purpose of compelling corporations which do business in a certain jurisdiction to submit to the domestic forum the questions arising therefrom is held to be "highly proper": *Lafayette Ins. Co. v. French*, 18 How. 404; *Gillespie v. Commercial etc. Ins. Co.*, 12 Gray, 201; 71 Am. Dec. 743; *Gibson v. Manufacturer's Ins. Co.*, 144 Mass. 81. The statutes of Indiana in evidence clearly were framed with this purpose in view; and under them the courts of that state had jurisdiction of the defendant in the action in which judgment was rendered.

Plaintiff's and defendant's exceptions overruled.

FOREIGN CORPORATIONS. — PROCESS, ON WHOM MUST BE SERVED: See note to *Blanc v. Paymaster Min. Co.*, 29 Am. St. Rep. 157; also extended note to *Hampson v. Wear*, 65 Am. Dec. 121. The agent of a foreign corporation upon whom service of process may be made must be some person invested by it with general powers involving the exercise of judgment or discretion: *Taylor v. Granite State Provident Ass'n*, 136 N. Y. 343; 32 Am. St. Rep. 749.

FOREIGN CORPORATIONS—WHETHER MAY BE SUED. — A debt contracted by a foreign corporation may be collected in the state where contracted, when the foreign corporation is brought within the jurisdiction by proper service of process: *Colorado Iron Works v. Sierra Grande Min. Co.*, 15 Col. 499; 22 Am. St. Rep. 433, and note. A foreign corporation transacting business in Texas, and having there business offices and agents, is subject to the jurisdiction of the courts of Texas: *Missouri Pac. R'y Co. v. Ouller*, 81 Tex. 382; and so in Virginia: *Baltimore etc. R. R. Co. v. Wightman*, 29 Gratt. 431; 26 Am. Rep. 384. A corporation may be sued in another state than that in which it was first incorporated, when it has also become a corporation of the state in which it is sued: *Baltimore etc. R. R. Co. v. Gallahue*, 12 Gratt. 655; 65 Am. Dec. 254, and note. In Massachusetts a foreign corporation may make contracts within the scope of its charter, and sue and be sued thereon: *Folger v. Columbian Ins. Co.*, 99 Mass. 267; 96 Am. Dec. 747, and note; and so also in Illinois: *Hannibal etc. R. R. Co. v. Crane*, 102 Ill. 249; 40 Am. Rep. 581.

WORTHINGTON v. WARING.

[157 MASSACHUSETTS, 421.]

CONSPIRACY — INJUNCTION AGAINST. — An injunction will not issue to enjoin defendant from continuing a conspiracy not to employ complainants.

PRACTICE. — A STATUTE DECLARING THAT SUITS IN EQUITY shall be in form either an action of contract or of tort, does not abolish the distinction between legal and equitable suits or remedies. A suit must, notwithstanding such statute, be either an action at law or a suit in equity, and cannot be both, or partly one and partly the other.

H. A. Dubuque, for the petitioners.

A. J. Jennings and A. S. Phillips, for the respondents.

FIELD, C. J. We take the substance of the petition to be that the petitioners were weavers by trade, and had been employed by the Narragansett Mills, a corporation in Fall River, and that they demanded higher wages, which the corporation refused to give; that they then left work, and that the defendants, who were the treasurer and superintendent of the corporation, sent their names to the officers of other mills in Fall River on a list which is called a black list, which informed these officers that the petitioners had left the Narragansett Mills on what is called a strike; and that thereupon the defendants conspired together and with the officers of other mills and agreed not to employ the petitioners, with intent to compel them either to go without work in Fall River, or to go back to work for the Narragansett Mills at such wages as that corporation should see fit to pay them. It does not appear by the petition that any of the petitioners had existing contracts for labor with which the defendants interfered. The prayer was that the respondents be restrained from annoying the petitioners and interfering with their rights to earn their livelihood at their trade in Fall River, and that they be enjoined to withdraw and destroy all black lists or other devices issued by them or their orders mentioning the names of the petitioners.

If the petition sets forth such a conspiracy as constitutes a misdemeanor at common law, on which we express no opinion, the remedy is by indictment. If the injury which had been received by the petitioners at the time the petition was filed constitutes a cause of action, on which we express no opinion, the remedy is by an action of tort, to be brought by each petitioner separately. The only grievance alleged which is continuing in its nature is the conspiracy not to employ the

petitioners, and there are no approved precedents in equity forenjoining the defendants from continuing such a conspiracy, or for compelling the defendants either to employ the petitioners or to procure employment for them with other persons: See *Boston Diatite Co. v. Florence Mfg. Co.*, 114 Mass. 69; 19 Am. Rep. 310; *Raymond v. Russell*, 143 Mass. 295; 58 Am. Rep. 137; *Smith v. Smith*, 148 Mass. 1; *Carleton v. Rugg*, 149 Mass. 550; 14 Am. St. Rep. 446; *Workman v. Smith*, 155 Mass. 92. It is plain, however, that the petition was drawn with a view to obtain some equitable relief. It is well known that equity has, in general, no jurisdiction to restrain the commission of crimes, or to assess damages for torts already committed. Courts of equity often protect property from threatened injury when the rights of property are equitable, or when, although the rights are legal, the civil and criminal remedies at common law are not adequate, but the rights which the petitioners allege the defendants were violating at the time the petition was filed are personal rights, as distinguished from rights of property.

The counsel for the petitioners contends that the petition can be maintained under Statute of 1887, chapter 388, and it has been suggested that this suit is partly an action at law and partly a suit in equity, and that if it cannot be maintained as either the one or the other, it can be maintained under this statute as partaking somewhat of the nature of both. The statute has been often referred to at the bar as one the meaning of which is not clear, and it becomes necessary to consider it. An examination of it shows that it relates solely to procedure; that it does not purport to change the substantive law, or to create any new cause of action either at law or in equity, or any new kind of relief either legal or equitable, or to change the jurisdiction of the two courts which are mentioned in the first section. It is provided in the fourth section that "Nothing in this act shall be construed to . . . extend or limit the power or jurisdiction of the court in proceedings at law or in equity, except as herein expressly provided," and no extension of the power or jurisdiction of either of the courts mentioned is expressly provided for in the statute, unless the addition of a new original process to be used in civil actions at law, made by the first section, is such an extension. The first section, so far as it relates to suits in equity, is taken from Public Statutes, chapter 151, sections 1, 5, 6: See Stats. 1880, c. 37; Stats. 1883, c. 223, secs. 1, 11.

Cases in equity under pre-existing statutes could be commenced by a bill or petition with a writ of subpoena, or by an original writ with a bill or petition, or with a declaration in an action of contract or tort, praying relief in equity, inserted in it. But civil actions at law, with some exceptions, could be commenced only by an original writ: Pub. Stats. c. 161, sec. 13, et seq. The first section of Statutes of 1887, chapter 383, permits civil actions at law, except replevin, to be commenced by a bill or petition which is in the nature of a declaration, and by the service of a subpoena which is in the nature of a writ of original summons. With this exception the statute does not purport to change the law relating to pleadings, nor to abolish the distinction between legal and equitable rights or remedies. The second section provides that "All provisions of law relating to pleadings shall apply to such proceedings so far as the same are applicable." This is not very intelligible as a statement of what provisions were considered by the legislature to be applicable, but it was probably inserted for the purpose of excluding any inference that the statute was intended to abolish the established forms of pleading. The Public Statutes, chapter 167, and other well-known statutes, contain elaborate provisions regulating pleading and procedure in actions at law, and there is no intimation in Statute of 1887, chapter 383, that these provisions were intended to be repealed, and they are not inconsistent with any of the provisions of that statute, except that a bill or petition with a subpoena may be used instead of a common-law writ and a declaration. The Public Statutes, chapter 151, the Statute of 1883, chapter 223, and other statutes, contain elaborate provisions regulating the pleading and procedure in suits in equity, and there is no intimation in the Statute of 1887 that these provisions were intended to be repealed, and they are all consistent with the provisions of that statute. The legislature could, of course, abolish all distinctions between actions at law and suits in equity, and adopt one form of procedure for all actions; but such a radical change is not to be inferred from a few general words of doubtful import such as are contained in the third section of this statute.

By the Revised Statutes suits in equity were to be commenced by bill with a subpoena, or by a bill inserted in a writ of original summons, with or without an order for the attachment of property: Rev. Stats., c. 90, sec. 117; c. 107, sec. 22; and the supreme judicial court had power "to make

and award all such judgments, decrees, orders, and injunctions, to issue all such executions and other writs and processes, and to do all such other acts as may be necessary or proper to carry into full effect all the powers which are or may be given to them by the laws of the commonwealth": Rev. Stats., c. 81, secs. 5, 6, 9. The Statute of 1853, chapter 371, was entitled "An act giving equitable remedies in suits at law," and the principal subjects of equity jurisdiction were in effect divided in the first and second sections into two classes, and it was provided in section 1, that all suits upon one class of subjects "shall be by action of contract, setting forth the facts and circumstances of the case, so far as may be necessary, and praying for relief in equity"; and in section 2, that all suits upon the other class "shall be by action of tort, in which the plaintiff, in addition to his claim for damages, may pray for relief in equity." The supreme judicial court was given exclusive jurisdiction of the suits, and empowered, "as well in term time as vacation," to "make and award all such decrees, judgments, orders, and injunctions; and issue all such executions and other writs and processes, and do all such other acts, as may be necessary or proper to carry into full effect the power to grant such relief." The Statute of 1855, chapter 194, section 2, provided that, "When relief is sought in equity, the material facts and circumstances relied on shall be stated with brevity, omitting all immaterial and irrelevant matter, either in the form of a bill, or petition to the court, or in a declaration in an action of contract or tort." The Statute of 1856, chapter 38, section 2, provided that "Suits in equity may be commenced by bill, or by writ of attachment." The substance of these statutes was incorporated in the General Statutes, chapter 113, sections 1 and 3, and is now contained in the Public Statutes, chapter 151, sections 1 and 5. The Public Statutes, chapter 153, section 3, provides that the supreme judicial and the superior courts "may make and award judgments, decrees, orders, and injunctions, and shall issue all writs and processes necessary or proper to carry into effect the powers granted to them; and when no form for any such writ or process is prescribed, the court shall frame one in conformity with the principles of law and the usual course of proceedings in the courts of this commonwealth": See Pub. Stats., c. 151, sec. 1; Stats. 1883, c. 223, sec. 1.

The decisions of this court upon the effect of Statutes of

1853, chapter 371, which provided in substance that suits in equity should be in form either an action of contract or of tort, show that the court did not construe that statute as abolishing the essential distinctions between legal and equitable suits or legal and equitable remedies and that, under that statute, a suit must be either an action at law or a suit in equity, and not both one and the other, or partly one and partly the other: *Darling v. Roarty*, 5 Gray, 71; *Winslow v. Otis*, 5 Gray, 360; *Topliff v. Jackson*, 12 Gray, 565; *Irvin v. Gregory*, 13 Gray, 215; *Harvey v. De Witt*, 13 Gray, 536; *Crane v. Adams*, 16 Gray, 542; *Stockbridge Iron Co. v. Cone Iron Works*, 99 Mass. 468. In *Irvin v. Gregory*, 13 Gray, 215, 217, the court say: "The suit is in form an action at law, praying relief in equity; and as specific performance cannot be had by a judgment at law, but may be afforded in equity, we regard this action, by force of the statute of 1853, as a suit in equity, and that rules and principles of equity are applicable to it." *Harvey v. De Witt*, 13 Gray, 536, 537, was an action of contract in three counts, and in the third count the plaintiff prayed for relief in equity. The court say that the action cannot be maintained. "It attempts to combine, in one suit, matters purely of law, and matters in equity. It cannot be maintained as a suit in equity; because it is apparent that, as to the claim in the first count at least, the plaintiff, if he has any remedy, has a plain, adequate and complete remedy at law. Nor can it be maintained as a suit at law; because it was brought originally in this court, without an affidavit stating that the amount sought to be recovered exceeded three hundred dollars: *Stats. 1840, c. 87, sec. 1.*" *Stockbridge Iron Co. v. Cone Iron Works*, 99 Mass. 468, was an action of tort, praying for relief in equity, brought in the supreme judicial court, and there was no affidavit that the damage demanded exceeded one thousand dollars, as provided by the General Statutes, chapter 112, section 6. The court say: "The prayer for relief gives jurisdiction of the action, and therefore no affidavit is necessary. Its character is that of a suit in equity." If this court were of opinion that a suit in equity did not lose its essential characteristics when brought as an action of contract or of tort under Statutes of 1853, chapter 371, it seems manifest that an action at law brought under Statutes of 1887, chapter 383, by bill or petition with a subpoena, instead of by an original writ, does not lose the essential characteristics of an action at law

Some of the consequences of holding that the distinctions between equitable and legal suits were intended to be abolished by the statute of 1887 may be briefly considered. The supreme judicial court has no jurisdiction over actions of tort, and only a very limited jurisdiction over actions of contract, dependent upon the amount of the damages demanded, to which the plaintiff, or some one in his behalf, must make oath. The superior court has a general jurisdiction over civil actions at law when the debt or damages claimed exceed one hundred dollars, and concurrent jurisdiction in equity with the supreme judicial court over most, but not all, suits in equity. It could not have been intended by the statute of 1887 that an action at law to recover twenty dollars might be brought in the supreme judicial court by bill or petition, or that all actions of tort might be brought in that court in the same manner. Whether brought by a bill or petition, or by a writ and declaration, they are still actions at law, in distinction from suits in equity, and the provisions which determine the jurisdiction of courts according to this distinction must still be in force. The system of pleading and procedure in actions at law and in suits in equity are different in important respects, and substantial rights depend upon the question whether any particular suit is one or the other. If, on the face of the papers it appears that the court has no jurisdiction of the proceeding, it may be dismissed on motion, and whether the court has jurisdiction may depend upon the question whether it is an action at law or a suit in equity. In an action at law either party has a right to a trial by jury, if seasonably demanded; but it has been held that, in a suit in equity, the plaintiff has not such a right, and that the defendant has not, except in those cases in which the constitution secures to him the right to a jury trial. Issues for a jury are usually framed in equity, in the discretion of the court. Suits in equity are often sent to masters, and actions at law to auditors, and the effect of the report in one case is not the same as in the other. A judgment at law for the payment of money is enforced by an execution, and the rights of a poor debtor arrested on execution at law are carefully provided for by statute; but although a court of equity may enforce a decree for the payment of money by issuing an execution in form as to common law under authority of the statutes, it may also enforce it by an attachment for contempt, and thus affect the rights of a debtor to be discharged

under the statutes relating to the relief of poor debtors. Provisions for appeal to the full court are, in some important respects, different in suits in equity from those in actions at law. These examples show the importance of determining whether any particular civil proceeding is an action at law or a suit in equity.

The third section of the statute of 1887 must be construed with reference to the remainder of the statute, and to the provisions in force when the statute was passed relating to pleading and procedure. As we think it plain that the statute was not intended to change, generally, the laws relating to pleading and procedure, or to abolish the distinction between legal and equitable proceedings, or to create new causes of action or new kinds of relief, this section must have a very limited scope. Under pre-existing statutes, courts of equity have the right to issue "all general and special writs and processes required in proceedings in equity to courts of inferior jurisdiction, corporations, and persons, when necessary to secure justice and equity": Stats. 1883, c. 223, sec. 1; Pub. Stats., c. 151, sec. 1. The supreme judicial court and the superior court, both at law and in equity, have authority to "issue all writs and processes necessary or proper to carry into effect the powers granted to them": Pub. Stats., c. 153, sec. 3. The statutes have expressly authorized in certain cases the use of certain legal processes by courts of equity, and of certain equitable processes by courts of law, of which examples may be found in Public Statutes, chapter 151, section 29; chapter 179, section 12; chapter 180, section 6. Certain equitable defenses in actions at law are permitted by Statutes of 1883, chapter 223, section 14, and in certain actions at law a claimant is permitted to appear, and the action becomes substantially a suit of interpleader: Stats. 1886, c. 281. The provisions are ample for amending actions at law into suits in equity, and suits in equity into actions at law: Stats. 1883, c. 223, sec. 17; Pub. Stats., c. 167, sec. 48. By Statutes of 1885, chapter 384, terms have been abolished in the supreme judicial court and the superior court, and these courts can issue any proper process at any time. Courts of equity, when they take jurisdiction of a bill, sometimes go on and decide, as incidental to the equitable matter contained in it, controversies which, standing alone, could only be determined in an action at law, but the third section of Statutes of 1887, chapter 383, cannot be held to relate to this subject.

A defendant, either in an action at law or in a suit in equity, is entitled to affirmative relief against the plaintiff only in well defined cases, and the pleadings must set forth his claim according to the established practice in law or equity. In certain suits in equity both the plaintiff and the defendant may be entitled to relief; as, for instance, in suits to settle the affairs of a partnership, and suits for the foreclosure or the redemption of a mortgage. The relief which the court is authorized to give by Statutes of 1887, chapter 383, section 3, "as the nature of the case may require," must be determined by the law as established, because the section does not purport to authorize forms of relief previously unknown to either law or equity. The only word which really occasions any doubt of the meaning of this third section is the word "both" in the first clause; but, in view of all the provisions of this statute, it must be taken that this refers to cases in which, by the customary practice or the provisions of other statutes, both legal and equitable relief can be given in the same suit. We think that the intention of the statute of 1887 is, that each proceeding under it must be treated either as an action at law or as a suit in equity, with the incidents which, by established practice or by other statutes, attach to the particular action or suit, and that the pleadings or procedure must conform to this view. The provision that the court may issue "any writs, orders, injunctions, or other processes necessary at any stage of the proceedings," would seem to add little or nothing to the powers of the courts under other statutes. The present petition cannot be maintained either as an action at law or a suit in equity.

Petition dismissed.

CONSPIRACY. — The question of granting injunctions to relieve against conspiracies is incidentally discussed in *Grand Rapids etc. Furniture Co. v. Haney etc. Furniture Co.*, 92 Mich. 558; 31 Am. St. Rep. 611. As to whether or not an action lies for a conspiracy to injure one in his business is discussed in *Delm v. Winfree*, 80 Tex. 400; 26 Am. St. Rep. 755, and note with cases collected.

ACTIONS. — When a complainant elects to defend himself at law upon the merits of his case, the law holds him to that election, and precludes him from bearing that case in equity unless he can show that he was prevented from bringing his defense before the court by fraud or accident: *Garcia v. Squires*, 9 Ark. 533; 50 Am. Dec. 224, and note; but when the common-law and chancery jurisdictions are vested in one tribunal, a court sitting in equity will decide questions of law as well as equity and grant relief accordingly: *French v. Parker*, 16 B. L. 219; 27 Am. St. Rep. 733, and note; *Blair v. Smith*, 114

Ind. 114; 5 Am. St. Rep. 593, and note. Equitable relief may be granted in a legal action in those states in which law and equity are administered by the same tribunal: *Snowden v. Wilas*, 19 Ind. 10; 81 Am. Dec. 370; *Rankin v. Charles*, 19 Mo. 490; 61 Am. Dec. 574, and note; *Neill v. Kees*, 5 Tex. 23; 51 Am. Dec. 746. In Pennsylvania an equitable plea is allowed in a court of law, there being no chancery court: *Pollard v. Shaffer*, 1 Dall. 210; 1 Am. Dec. 239.

COMMONWEALTH v. WOODWARD.

[187 MASSACHUSETTS, 512.]

GRAND JURY—PREVIOUS OPINION OF GRAND JUROR.—An indictment should not be held bad because one of the jurors had before the meeting of the jury made a personal investigation of the guilt of the accused and therefrom had formed an opinion that he was guilty. In the absence of a statute changing the rule of the common law upon the subject, the grand jury is an informing and accusing body rather than a judicial tribunal and may found an indictment upon the knowledge of its members, or of one or more of them.

J. W. Cummings, for the defendant.

C. N. Harris, second assistant attorney-general, for the commonwealth.

ALLEN, J. The plea in abatement raises the question whether an indictment is to be held bad because one of the grand jurors by whom it was found, being otherwise competent and qualified to serve, had before the meeting of the grand jury made a personal investigation into the guilt of the accused, and had secreted himself in a room with an officer for the purpose of listening to declarations and admissions made by the accused concerning the crime, and had heard such declarations and admissions, and had listened to statements of officers to the effect that the accused was guilty, and had thereupon formed an opinion, and believed him to be guilty before and at the time of the investigation of the case by the grand jury. We are of opinion that these facts constitute no legal objection to the validity of the indictment.

This opinion is in accordance with what appears to us to be the clear weight of judicial decision elsewhere, though in some instances views to the contrary have been held. It is to be borne in mind, however, that in examining the decisions of different tribunals in reference to the position, functions, and proper methods of discharging the duties of grand jurors, it is necessary to know the statutory law under which those decisions have been rendered, in order rightly to understand them.

For example, as we understand it, in New York a grand jury can receive none but legal evidence: Code Crim. Proc., secs. 255, 257; while in Connecticut it is the duty of each grand juror, before the grand jury come together, to make a personal investigation of all offenses that come to his knowledge: Gen. Stats. of Conn. (Revision of 1888), c. 12; *Watson v. Hall*, 46 Conn. 204.

In Massachusetts there is no statute defining the duties of grand jurors, except so far as the same may be gathered from their oath of office. This oath is as follows: "You, as grand jurors of this inquest for the body of this county of —, do solemnly swear that you will diligently inquire, and true presentment make, of all such matters and things as shall be given you in charge; the commonwealth's counsel, your fellows', and your own, you shall keep secret, you shall present no man for envy, hatred, or malice, neither shall you leave any man unpresented for love, fear, favor, affection, or hope of reward; but you shall present things truly, as they come to your knowledge, according to the best of your understanding; so help you God": Pub. Stats., c. 213, sec. 5. This is substantially the form of the oath which has long been administered in England; and there as here the grand jury is deemed to be an informing and accusing body, rather than a judicial tribunal: 4 Bla. Com. 298, 300; *Justice Field's Charge*, 2 Saw. 667.

There are evils no doubt which would arise if a general practice were to spring up of importuning grand jurors privately in favor of or against the finding of indictments. If this were done on one side, it might also be done on the other. If with one grand jury, then with all. If by one person, then by many persons. If in one case, then in all cases. The evil, or apprehension of evil, from this source has been so great elsewhere as sometimes to lead to legislation for preventing or punishing it: *People v. Sellick*, 4 N. Y. Crim. Rep. 329. No such legislation has yet been deemed necessary in this commonwealth, and the question of the criminality of such importuning, if it should arise, would have to be determined on general principles of law.

In the present case, no corruption is charged upon the grand juror, or upon the officers who made statements to him. The most that can be said is that there was an excess of zeal.

It is always considered that in finding indictments grand jurors may act upon their own knowledge, or upon the knowl-

edge of one or more of their number. It is accordingly held in most jurisdictions that it is no objection to the validity of an indictment, that one or more of the grand jurors, who were otherwise qualified, had formed or expressed an opinion of the guilt of the accused: *Tucker's Case*, 8 Mass. 286; *State v. Hamlin*, 47 Conn. 95, 114; 36 Am. Rep. 54; *State v. Chairs*, 9 Baxt. 196; *Musick v. People*, 40 Ill. 268; *Lee v. State*, 69 Ga. 705; *United States v. Williams*, 1 Dill. 485. Also that an interest or bias in the case, if not pecuniary, is not an objection: *Commonwealth v. Brown*, 147 Mass. 585; 9 Am. St. Rep. 786; *State v. Brainerd*, 56 Vt. 532; 48 Am. Rep. 818; *State v. Rickey*, 10 N. J. L. 83; *Commonwealth v. Strother*, 1 Va. Cas. 186; *State v. Easter*, 30 Ohio St. 542; 27 Am. Rep. 478; *Koch v. State*, 32 Ohio St. 353; *State v. Maddox*, 1 Lea, 671; *In re Nowlan*, 2 Jebb & S. 1. It has also often been held or declared that the court will not inquire whether incompetent evidence was heard by the grand jury: *Commonwealth v. Knapp*, 9 Pick. 496; 20 Am. Dec. 491; *State v. Dayton*, 23 N. J. L. 49; 53 Am. Dec. 270; *State v. Fasset*, 16 Conn. 457, 472; *Hope v. People*, 83 N. Y. 418; 38 Am. Rep. 460; *People v. Hulbut*, 4 Denio, 138; 47 Am. Dec. 244; *Commonwealth v. Crans*, 3 Pa. L. J. 172; *Stewart v. State*, 24 Ind. 142; *Creek v. State*, 24 Ind. 151; *State v. Tucker*, 20 Iowa, 508; *State v. Fowler*, 52 Iowa, 103; *State v. Boyd*, 2 Hill (S. C.), 288; 27 Am. Dec. 376; *Bloomer v. State*, 3 Sneed, 66; *Regina v. Russell*, Car. & M. 247.

The indictment is merely an accusation or charge of crime, For the protection of the people against unreasonable accusations, there are constitutional and statutory provisions that, with certain exceptions, no person shall be held to answer for crime unless upon indictment: Amendment of Const. of U. S., art. 5; Pub. Stats., c. 200, sec. 3. This means an indictment found in the usual course of proceedings. It is not however necessary that each grand juror shall be free from bias or prejudice, provided he has the general qualifications which are required. Such a test is not implied either from the terms of his oath, or from the nature of his duties. If such an inquiry were open, the delays and complexity of criminal trials would be greatly increased, and no correspondingly useful purpose would be served.

The plea in abatement was rightly overruled.

Conviction to stand.

GRAND JURORS. — BIAS OF, AS GROUND FOR QUASHING INDICTMENT: See extended note to *Commonwealth v. Green*, 12 Am. St. Rep. 906. An objec-

tion to a grand juror on account of his expression of an opinion cannot be pleaded in abatement: *State v. Hamlin*, 47 Conn. 95; 36 Am. Rep. 54; note to *State v. Davis*, 34 Am. Rep. 706. It is no objection to an indictment for burglary in breaking into a bank that two of the grand jurors by whom it was found were stockholders of the bank: *Roland v. Commonwealth*, 82 Pa. St. 306; 22 Am. Rep. 758, and note. See also numerous cases in this series cited in the opinion to the leading case.

ATLANTIC WORKS v. TUG GLIDE.

[187 MASSACHUSETTS, 525.]

JURISDICTION — ADMIRALTY. — IF THE MARITIME LAW GIVES A LIEN and a proceeding *in rem* to enforce it, a state statute cannot give the state courts concurrent jurisdiction by creating a similar statutory lien.

ADMIRALTY — JURISDICTION OVER VESSELS. — A state statute creating a lien against vessels for repairs made in their home port, where the maritime law does not give such lien, and authorizing the enforcement of the lien in the courts of the state, is valid.

R. W. Foster, for the petitioner.

E. P. Carver and E. E. Blodgett, for the respondents.

HOLMES, J. This is a petition under Public Statutes, chapter 192, section 17, to enforce a lien given by section 14 of the same chapter, for repairs furnished to a vessel — in this case a tugboat — in her home port. The respondents filed a motion to dismiss for want of jurisdiction, which was allowed by the superior court. The only question is, whether the superior court has a right to exercise the jurisdiction which the statute purports to confer upon it.

There is no doubt that when the maritime law gives a lien and a proceeding *in rem*, a state statute cannot give the state courts concurrent jurisdiction by professing to create a similar statutory lien. The attempt to do so would be contrary to United States Revised Statutes, section 563, clause 8, and United States Revised Statutes, section 711, clause 8, and the state law would be void: *The Hine v. Trevor*, 4 Wall. 555, 569; *The Moses Taylor*, 4 Wall. 411; *The Belfast*, 7 Wall. 624.

Most of the later decisions and *dicta* go further, and deny the power of state statutes to confer jurisdiction of a proceeding *in rem* upon the state courts, even when the maritime law does not give a lien, if the contract secured by the statutory lien is maritime, as in the case of repairs to a vessel in her

home port: *Warren v. Kelley*, 80 Me. 512; *Weston v. Morse*, 40 Wis. 455; *Steamer Petrel v. Dumont*, 28 Ohio St. 602; 22 Am. Rep. 397; *Crawford v. The Bark Caroline Reed*, 42 Cal. 469; *Dever v. Steamboat Hope*, 42 Miss. 715; *In re Steamboat Josephine*, 89 N. Y. 19; *Sheppard v. Steele*, 43 N. Y. 52; 3 Am. Rep. 660; *Brookman v. Hamill*, 48 N. Y. 554, 557; 3 Am. Rep. 781; *Pool v. Kermit*, 59 N. Y. 554; *The John Farron*, 14 Blatchf. 24, 26; *The Guiding Star*, 18 Fed. Rep. 263, 267; *The Madrid*, 40 Fed. Rep. 677, 680.

On the other hand, there are decisions and *dicta* the other way, including one case in this court: *Donnell v. The Starlight*, 108 Mass. 227, 230; *Southern Dry Dock Co. v. Gibson*, 22 La. Ann. 623; *Williamson v. Hogan*, 46 Ill. 504; *Mitchell v. Steamboat Magnolia*, 45 Mo. 67; *Boylan v. Steamboat Victory*, 40 Mo. 244.

The supreme court of the United States has given no decision upon the question. Had it done so, of course we should defer to its authority upon a matter of which it is the final judge; but until there is a direct adjudication by the only tribunal whose decision is an authority, we feel bound to exercise our own judgment upon the merits of the case. The *dicta* which have been uttered in rendering decisions of the supreme court have not been consistent. In *The Lottawanna*, 21 Wall. 558, 580, the jurisdiction of the state courts is denied. In earlier cases, and, if we interpret their language rightly, in later ones, it is said or implied that the state courts can act: *Johnson v. Chicago etc. Elevator Co.*, 119 U. S. 388, 399; *Norton v. Switzer*, 93 U. S. 355, 365, 366; *The Belfast*, 7 Wall. 624, 645, 646; *The Steamer St. Lawrence*, 1 Black, 522, 530, 531; *Maguire v. Card*, 21 How. 248, 251.

The ground for denying the jurisdiction when the maritime law gives a lien is wanting here. The ground in that class of cases, as has been stated again and again, is that the state law purporting to create a parallel lien and a parallel jurisdiction is void: *The Hine v. Trevor*, 4 Wall. 555, 569; *The Belfast*, 7 Wall. 624, 644; *Johnson v. Chicago etc. Elevator Co.*, 119 U. S. 388, 397; but it has been decided, and it still is assumed by the supreme court of the United States, that state laws creating liens like the one before us are valid, and, whatever might be our opinion were the question open to us, we proceed on that assumption without argument: *Peyroux v. Howard*, 7 Pet. 324; *The Steamer St. Lawrence*, 1 Black, 522;

Ex parte McNiel, 13 Wall. 236, 243; *The Lottawanna*, 21 Wall. 558, 581; *The Corsair*, 145 U. S. 335, 347.

If the statute creating the lien is valid, then it would be strange, to say the least, if the law which creates a right were incompetent to protect it, and we are justified in looking with some nicety at an argument which leads to that result. The main argument against the jurisdiction seems to be that the lien derives its quality from the contract, and that, as the latter is maritime, the former must be, and, as a maritime lien, solely within the jurisdiction of the district court; or that the statute giving the district courts jurisdiction, "of all civil causes of admiralty and maritime jurisdiction" excludes the state courts from all proceedings in aid of a maritime contract, except such as fall within the description of "a common-law remedy" in the saving clause; and that proceedings *in rem* to enforce the statutory lien are a remedy for the enforcement of the contract secured by the lien.

But if the lien created by the state law were maritime in a strict sense, it would be the duty, and not merely the right, of the admiralty courts to enforce it. We do not understand the supreme court of the United States to assert the right to abolish libels *in rem* generally by rule. Yet in the successive changes of the twelfth admiralty rule it has asserted and exercised the right to regulate, and to permit or to deny, proceedings *in rem* in the admiralty to enforce liens of domestic material men. Moreover, as was said in *The Belfast*, 7 Wall. 624, 644: "State legislatures have no authority to create a maritime lien"; and that proposition, as we have observed above, was the ground of decision in that class of cases.

Again, if the lien were a mere matter of remedy, and were simply a right to a proceeding *in rem* as a mode of enforcing the contract to which it is attached, then, if the state law purported to attach one to a maritime contract, it would be equivalent to saying that there shall be a process *in rem* in the admiralty in suits to enforce such contracts, and the question would arise how a state legislature could impose a new process upon a court outside of its power. Traces of such a doubt are to be seen occasionally: *The Red Wing*, 14 Fed. Rep. 869, 871; *The Ship Edith*, 11 Blatchf. 451, 454, and 94 U. S. 518. Compare *The Milford*, Swab. 362. Yet the supreme court sustains the law, as has been shown, and under the present twelfth admiralty rule the United States admiralty courts may take jurisdiction to enforce the lien.

We do not understand that the supreme court ever has intimated that the operation of the state law is dependent upon the admiralty rule for the time being; so that when the district courts do not enforce the lien, the state courts may do so, but when a rule like the present is in force, the legislature cannot give them jurisdiction. We understand that, if the legislature has the power at any time, it has it, whatever the admiralty rule may be.

It appears to us that the decisions sustaining the law and the power of the admiralty court to take jurisdiction under it are grounded on the assumption that such a lien is not a mere matter of remedy, but is a right of property, and as such is distinct from the proceeding *in rem* by which it is enforced: *The Rock Island Bridge*, 6 Wall. 213, 215; *The Maggie Hammond*, 9 Wall. 435, 456; *Ex parte McNiel*, 13 Wall. 236, 243; *The Lottawanna*, 21 Wall. 558, 579; *The Young Mechanic*, 2 Curt. 404; *The Barque Havana*, 1 Sprague, 402; *The Mary Ann*, L. R. 1 Ad. & E. 8, 11; *The Two Ellens*, L. R. 4 P. C. 161. If this be so, it no more follows from the fact that the contract may give rise to a "civil cause of admiralty jurisdiction," that enforcement of the lien is such a cause, than it follows that the foreclosure of a mortgage given to secure the same contract would be; nor does it seem to us to matter that the mode of enforcement is by a proceeding *in rem*. State courts can enforce liens not maritime by proceedings *in rem*: *Foster v. The Richard Busteed*, 100 Mass. 409; 1 Am. Rep. 125; *McDonald v. The Nimbus*, 137 Mass. 360; *Edwards v. Elliott*, 21 Wall. 582.

It may be asked how, if the lien is not maritime, the admiralty courts can be justified in enforcing it. It may be, as suggested by Bradley, J., in *The Lottawanna*, 21 Wall. 558, 580, that the United States courts did so in imitation of the colonial courts upon succeeding to them, and that the answer is to be sought in history rather than in logic. Of course, such liens would be recognized in any event when law and justice required it in the distribution of proceeds: *The Harrison*, 2 Abb. 74; *The Cargo ex Galam*, 2 Moore P. C., N. S., 216, 236.

In the absence of convincing reasons or binding authority the other way, we feel bound to follow the case of *Donnell v. The Starlight*, 103 Mass. 227, 230, to the full extent of the proposition there laid down as settled,—“that the courts of a state have jurisdiction to enforce liens, created by its laws,

for labor and materials furnished in constructing or repairing domestic vessels."

Decree dismissing the petition reversed, and motion overruled.

JUDGES MORTON AND KNOWLTON dissented from the opinion of the other justices; their dissent was expressed by Judge Morton. He said, that while a statute like that under consideration had been in force since 1855, it had not been so presented for decision that the law had been finally and firmly established, and that the case of *Donnell v. The Starlight*, 103 Mass. 227, had not been much considered; that it was provided by the statute of the United States that the district court should have jurisdiction, exclusive of the courts of the several states, of "all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it," and that, under this provision, the courts of the state could take jurisdiction of civil maritime cases only so far as to enforce common-law remedies; that he thought there was no doubt that a contract to repair a domestic vessel was a maritime contract, and that any uncertainty which had existed as to the extent of admiralty jurisdiction had been removed by the cases of *Peyroux v. Howard*, 7 Pet. 324; *Steamboat Orleans v. Phœbus*, 11 Pet. 175, 183; *The Steamer St. Lawrence*, 1 Black, 522; *Waddell v. Steamer Daisy*, 2 Wash. (Ter.) 76, 80; that if it was admitted that a state can give a lien to a maritime contract where none existed by the maritime law and could provide for its enforcement in its courts by proceedings *in rem*, then the exclusive jurisdiction of the district court would be limited to those cases arising upon maritime contracts in which a lien, enforceable by proceedings *in rem*, is given by the maritime law, and the question of exclusive jurisdiction would be made to turn, not on the question whether the cause of action arises upon a maritime contract, but on whether, by the maritime law, a lien enforceable by proceedings *in rem* is attached to it; that the lien created by the statute in this case is in the nature of a remedy designed to secure the performance of the contract on which it is based: *Mobile Building etc. Ass'n v. Robertson*, 65 Ala. 382; *Crawford v. The Bark Caroline Reed*, 42 Cal. 469; *Roberts v. Jacks*, 31 Ark. 597; 25 Am. Rep. 584; *The Steamer Petrel v. Dumont*, 28 Ohio St. 602; 22 Am. Rep. 397; *Hall v. Bunte*, 20 Ind. 304; *Bolton v. Johns*, 5 Pa. St. 145; 47 Am. Dec. 404; *Frost v. Ilsley*, 54 Me. 345; *Barrows v. Baughman*, 9 Mich. 213; that whether the contract is maritime does not depend on whether it can be enforced by a lien and proceedings *in rem*, but on its nature and subject-matter: *Insurance Co. v. Dunham*, 11 Wall. 1; *People's Ferry Co. v. Beers*, 20 How. 393, 401; *Walters v. Steamboat Mollie Dozier*, 24 Iowa, 192; 95 Am. Dec. 722; that liens given under state laws to persons furnishing labor and materials in repairing domestic vessels have long been enforced by the district courts of the United States, and their action in this respect has been sustained in *Peyroux v. Howard*, 7 Pet. 324; *The Lottawanna*, 21 Wall. 558, 580; *The Corcair*, 145 U. S. 335, 347; that the district courts had not been bound to enforce such liens when created by state laws, but had nevertheless done so in the interests of justice: *Ex parte McNiel*, 13 Wall. 236, 243; *Edwards v. Elliott*, 21 Wall. 532, 556; *The Steamer St. Lawrence*, 1 Black, 522, 528; *The Samuel Marshall*, 49 Fed. Rep. 754, 758; *Weston v. Morse*, 40 Wis. 455; *Crawford v. Bark Caroline Reed*, 42 Cal. 469; *Warren v. Kelley*, 80 Me. 512; *Hamilton v. Merrill*, 25 Ohio St. 11; *Case v. Woolley*, 6 Dana, 17; *Wight v. Maxwell*, 4 Mich. 44, 54; that they had

enforced such liens upon the same principle upon which they would have enforced a lien given by a foreign law: *The Maggie Hammond*, 9 Wall. 435; *The Barque Havana*, 1 Sprague, 402; *Ex parte McNiel*, 13 Wall. 236, 243; *The Schooner Columbus*, 5 Saw. 487, 488; that while there were some authorities, and some expressions in opinions of the supreme court of the United States, to the effect that such liens could be enforced by state courts in proceedings *in rem*: Abbott on Shipping, 7th Am. ed., 143, n. 3; 1 Parson's Maritime Law, 501, n. 2; 2 Parson's Maritime Law, 640; *Norton v. Switzer*, 93 U. S. 355, 356, 366; *Johnson v. Chicago and Pacific Elevator Co.*, 119 U. S. 388, 399; yet, in his judgment, the result of the later and better-considered opinions upon the subject expressed a different view and indicated that the state courts did not have such jurisdiction: *The Lottawanna*, 21 Wall. 558, 580; *Hine v. Trevor*, 4 Wall. 555, 571, 572; *The Moses Taylor*, 4 Wall. 411; *The Belfast*, 7 Wall. 624, 644; *Edwards v. Elliott*, 21 Wall. 532, 556; *Leon v. Galceran*, 11 Wall. 185; *The Guiding Star*, 18 Fed. Rep. 236; *The Madrid*, 40 Fed. Rep. 677; *Warren v. Kelley*, 80 Me. 512; *Weston v. Morse*, 40 Wis. 455; *Steamer Petrel v. Dumont*, 28 Ohio St. 602; 22 Am. Rep. 397; *Crawford v. Bark Caroline Reed*, 42 Cal. 469; *Dever v. Steamboat Hope*, 42 Miss. 715; *In re Steamboat Josephine*, 39 N. Y. 19; *Sheppard v. Steele*, 43 N. Y. 52; 3 Am. Rep. 660; *Poole v. Kermit*, 59 N. Y. 554; *The John Farron*, 14 Blatchf. 24, 26; *United States v. Burlington etc. Ferry Co.*, 21 Fed. Rep. 331, 337; *Waggoner v. St. John*, 10 Heisk. 503; *Marshall v. Curtis*, 5 Bush, 607; *Wight v. Maxwell*, 4 Mich. 44; *Walters v. Steamboat Mollie Dozier*, 24 Iowa, 192; 95 Am. Dec. 722.

ADMIRALTY JURISDICTION, EXCLUSIVENESS OF. — Where the admiralty jurisdiction of the United States courts attaches, it undoubtedly excludes the jurisdiction of the state courts, and a state cannot confer jurisdiction upon its courts in such cases: *Gindele v. Corrigan*, 129 Ill. 582; 16 Am. St. Rep. 292, and note with the cases discussing the exclusiveness of admiralty jurisdiction, collected.

ADMIRALTY JURISDICTION — WHEN STATE COURTS MAY EXERCISE JURISDICTION. — A state court may take cognizance of an action *in personam* brought against the master and owner of a vessel, under a state statute to enforce a claim secured by a lien not created by maritime law, and not exclusively within the jurisdiction of admiralty: *State v. Voorhies*, 39 La. Ann. 499; 4 Am. St. Rep. 274, and note. Liens against vessels may be enforced in the state courts when the proceeding to enforce them does not amount to an admiralty proceeding *in rem*, or otherwise conflict with the constitution of the United States: *Gindele v. Corrigan*, 129 Ill. 582; 16 Am. St. Rep. 292, and especially note. A state statute providing for liens on steamers and vessels for certain services, materials, and labor, enforceable by a civil action, is valid: *Washington Iron Works Co. v. Jensen*, 3 Wash. 584.

VILES v. CITY OF WALTHAM.

[157 MASSACHUSETTS, 542.]

DOMICILE. — To ACQUIRE A DOMICILE, there must be a residence in a place and an intention to make it one's home. It is sufficient that he took up his abode in the place if he did so with an intention to acquire a home there and of giving up his previous home.

DOMICILE — EVIDENCE. — DECLARATIONS of a person accompanying a change of his abiding place are competent to explain the change as part of the *res gestæ*. They are also often admissible as evidence on the broader ground that they tend to show his intention to make the change. If they indicate the state of mind of the declarant, they have a legitimate tendency to show his intention.

EVIDENCE. — DECLARATIONS OF A PURPOSE, INTENTION, OR FEELING made after the beginning of a controversy to which they relate, are not generally admissible in evidence, because they are naturally so affected by interest as to be untrustworthy.

DOMICILE, EVIDENCE TO SHOW CHANGE OF. — When one has changed his place of abode, and the question arises whether he intended to change his domicile, all his acts and conduct which fairly indicate his purpose in that particular, within a reasonable time before and after the event, may be put in evidence, together with his declarations accompanying such acts.

DOMICILE. — DECLARATIONS made to the assessor of a town just before the declarant left there for another place, to the effect that he intended to change his residence to the latter place, and his consulting residents of that place soon after reaching there as to measures necessary to establish his residence and acquire citizenship, are admissible for the purpose of proving that when he changed his place of abode he intended to change his residence also.

C. M. Ludden, for the defendant.

S. J. Elder, for the plaintiff.

KNOWLTON, J. The question at issue is whether the domicile of the plaintiff was in Waltham on May 1, 1890, and the only exceptions relate to the introduction of evidence bearing on that issue. There was no dispute at the trial that his domicile was in Waltham until April 28, 1890, when he started for Chicago, arriving there the following day. It was also in evidence that he afterwards dwelt in Chicago, and had his principal place of business there.

To acquire a domicile there must be residence in a place, and an intention to make that place one's home. To maintain his suit the plaintiff was required to prove, not only that he took up his abode in Chicago, but also that he did it with the intention of giving up his home in Waltham and acquiring a home in Chicago. The change in his place of abode might be temporary or permanent. It might indicate a change of domicile or not, according to the circumstances at-

tending it. Declarations of a person accompanying a change of abiding place have always been held competent to explain the change as a part of the *res gestæ*; but declarations in such cases are often admissible on a broader ground than as a part of the act of removing from one place to another. The intention of the person removing is competent to be proved as an independent fact, and anything which tends to show his intention in making the change may be introduced, if it is free from objection in other particulars. The intention may be inferred from acts and conduct, and conduct which tends to show the intention is competent for that purpose. Declarations which indicate the state of mind of the declarant naturally have a legitimate tendency to show intention: *Commonwealth v. Trefethen*, 157 Mass. 180. But, on grounds of public policy, declarations in one's own favor by a party to a suit are not ordinarily received in evidence. In the first place, so far as they purport to be a mere narrative of past events, they are not primarily an expression of present feeling, but a recital of what has been, which for its value depends upon the truthfulness of the speaker. Secondly, declarations of a purpose or intention, or of a feeling, made after the beginning of a controversy to which they relate, are naturally so affected by interest as to be untrustworthy, and for that reason they should not be received. This rule, however, does not go so far as to exclude expressions of pain, or other indications of one's mental or physical condition that may be treated as symptoms, which often are valuable evidence of a condition of body or mind. Thirdly, the danger that declarations may have been made for a purpose, when they are sought to be introduced as evidence in favor of the person making them, has led to the exclusion of them, even on the issue of what was the intention or state of mind of the declarant, unless they are made under such circumstances as to give them some corroboration. In general, such corroboration is found in the fact that they accompany and explain acts which, of themselves would be competent evidence on the issue involved. They are then admissible as a part of the *res gestæ*.

When one has changed his place of abode, and the question arises whether he intended to change his domicile, all his acts and conduct which fairly indicate his purpose in that particular within a reasonable time before and after the event may be put in evidence, together with the declarations accompanying such acts. The principal difficulty in applying this rule

grows out of the uncertainty, in some cases, whether the conduct relied on throws light on the question, and sometimes whether there are such indications that a controversy was foreseen as to require the exclusion of the declarations, as probably made with a consciousness of an interest to make them. This difficulty has led to some conflict of authority in this commonwealth as well as elsewhere: *Thorndike v. Boston*, 1 Met. 242; *Kilburn v. Bennett*, 3 Met. 199; *Salem v. Lynn*, 13 Met. 544; *Cole v. Cheshire*, 1 Gray, 441; *Wilson v. Terry*, 11 Allen, 206; *Reeder v. Holcomb*, 105 Mass. 98; *Wright v. Boston*, 126 Mass. 161; *Brookfield v. Warren*, 128 Mass. 287; *Pickering v. Cambridge*, 144 Mass. 244; *Mutual Life Ins. Co. v. Hillmon*, 145 U. S. 285; *Insurance Co. v. Mosley*, 8 Wall. 397.

Without attempting to review the cases, we are of opinion that no error is disclosed in this bill of exceptions. The plaintiff's notice to the assessors of Waltham that he was about to change his residence was given just before he started for Chicago, and was so closely connected with the act of going, that it might perhaps be held competent, under the strictest rule, as accompanying and explaining his act of removal. At all events, it was a part of an apparent effort to effect a change of residence which should be complete, and be recognized by the assessors. Both the act of visitation of the assessors and the language accompanying it were competent as indicating the plaintiff's purpose in regard to his residence: *Kilburn v. Bennett*, 3 Met. 199.

The other conversations testified to were either on the last two days of April, or early in May, 1890. Having just arrived in Chicago, the plaintiff consulted each of the two witnesses in regard to the measures necessary to be taken to establish his residence, and acquire citizenship in Chicago. His solicitation of advice on this subject was in each case an act apparently done naturally and regularly, which tended to show his state of mind in regard to his change of his place of abode and his intention in regard to his domicile. What he said in connection with these consultations was competent as a part of the *res gestæ*.

Exceptions overruled. —

DOMICILE DEFINED. — The legal idea of domicile is the place where a man has his permanent residence and established business: *Pearce v. State*, 1 Sneed, 63; 60 Am. Dec. 135, and note; *Hairston v. Hairston*, 27 Miss. 704; 61 Am. Dec. 530, and note. Domicile is a fixed habitation in any place without

the present intent to remove therefrom: *Gilman v. Gilman*, 52 Me. 165; 83 Am. Dec. 502, and note; *Shaeffer v. Gilbert*, 73 Md. 66. See extended note to *Ringgold v. Barley*, 59 Am. Dec. 111; *Frost v. Brisbin*, 19 Wend. 11; 32 Am. Dec. 423, and extended note.

DOMICILE — HOW ACQUIRED. — Residence and the intention to remain must both concur in order to establish a domicile: *Gilman v. Gilman*, 52 Me. 165; 83 Am. Dec. 502, and note; *Gravillon v. Richards*, 13 La. 293; 33 Am. Dec. 563, and note; *Hairston v. Hairston*, 27 Miss. 704; 61 Am. Dec. 530, and note; *Hart v. Lindsey*, 17 N. H. 235; 43 Am. Dec. 597, and note; *Hyman v. Schlenker*, 44 La. Ann. 108. See extended note to *Ringgold v. Barley*, 59 Am. Dec. 113.

DOMICILE — HOW CHANGED. — Where a person entirely abandons his former domicile with no intention of returning thereto, but with the intention of making his home at a fixed place elsewhere, the latter place becomes his domicile: *White v. Tennant*, 31 W. Va. 790; 13 Am. St. Rep. 896, and note; *Lowry v. Bradley*, 1 Spears' Eq. 1; 39 Am. Dec. 142, and note; *Inhabitants of Phillips v. Inhabitants of Kingsfield*, 19 Me. 375; 36 Am. Dec. 760. The following line of cases hold that a new domicile is not acquired by a mere intention to so acquire it, without the fact of actual removal and the intent to remain there: *Ringgold v. Barley*, 5 Md. 186; 59 Am. Dec. 107, and extended note at page 113; *Gravillon v. Richards*, 13 La. 293; 33 Am. Dec. 563, and note; *Brown v. Butler*, 87 Va. 621; *State v. Sanders*, 106 Mo. 188. See extended note to *Frost v. Brisbin*, 32 Am. Dec. 423.

DOMICILE — EVIDENCE — DECLARATIONS. — On the question of the intent of a party to change his residence, his declarations as to such intent are admissible in evidence: *Kreitz v. Behrensmeyer*, 125 Ill. 141; 8 Am. St. Rep. 349, and note; *Jackson v. Du Bose*, 87 Ga. 761. See also *Hartford v. Champion*, 58 Conn. 268.

COPELAND v. DRAPER.

[157 MASSACHUSETTS, 553.]

WARRANTY. — A LIVERY STABLE KEEPER DOES NOT WARRANT OR INSURE THE SUITABLENESS OF EVERY HORSE he lets. Hence, though he lets a horse to be ridden and it runs away and injures its rider, the latter cannot recover for such injury when the stable keeper has not been guilty of any negligence and did not know of the horse's having any defects or vicious habits.

ACTION of tort to recover for injuries received by the plaintiff while riding a horse belonging to the defendant. The defendant had furnished the horse for hire to the city of Boston to be used by its mounted patrolmen; the horse had been examined and tried by one of such patrolmen and selected by him for use by the city. The officer who thus selected the horse rode it for several weeks and found it free from fault and suitable for the purpose for which it was hired. After-

wards it became the plaintiff's duty to mount and ride the same horse, and while so riding, without fault on the plaintiff's part, it became restive and uncontrollable, bolted, and ran violently upon a sidewalk, throwing the plaintiff, falling on him and breaking his leg. There was a scar in the mouth of the horse which one of the witnesses testified, "looked as if caused by a cut." The plaintiff on his part testified that he thought the horse at the time of the injury must have had, "a fit or blind staggers, or something of that kind." At the trial the counsel for plaintiff admitted that he had no evidence to show that defendant before the accident knew, "or, under the exercise of reasonable care or diligence, could have known or discovered, that the horse was as described in the declaration," but he nevertheless requested the court to rule that defendant was bound to furnish a suitable horse and that if it, "at the time of the accident was unmanageable and unsuitable, the defendant was liable to plaintiff in the action without regard to defendant's knowledge or negligence, and that it appearing that the horse was unmanageable at the time of the accident, a *prima facie* case was made out as to the negligence of the defendant." The court refused to so rule, and on the contrary, instructed the jury that the plaintiff could not recover.

J. E. Hanly, for the plaintiff.

H. G. Allen, for the defendant.

HOLMES, J. *Horne v. Meakin*, 115 Mass. 326, the case relied on by the plaintiff, only decides that, if a party negligently furnishes an unsuitable horse, it is not a defense that he did not know that the horse was unsuitable. In the case at bar, negligence was excluded by the plaintiff's admission that there was no evidence that the defendant knew, or by the exercise of reasonable care could have known, that the horse was unsuitable, if in fact it was; therefore, in order to recover, the plaintiff must maintain that a livery-stable keeper warrants or insures the suitability of every horse which he lets.

No such liability is imposed on him by the fact that he follows a common calling, any more than it is upon every man who keeps a shop. Even in old times, the exercise of a common calling, only required a man to show skill in his business: *Fitzherbert's Natura Brevium*, 94 D; *Norris v. Staps*, Hob. 210, 211; 3 Bla. Com. 164; *Rex v. Kilderby*, 1 Saund. 311, 312, note 2.

Common carriers were insurers, not because they had a common calling, but because they were bailees, coupled with certain gradual changes in the law not material here. See *Brewster v. Warner*, 136 Mass. 57, 59; 49 Am. Rep. 5.

If it should be sought to charge the defendant for the horse as for a dangerous animal, the liability for a horse on that ground, apart from bailment, is confined to cases where the owner has notice of the dangerous tendency: *Commonwealth v. Pierce*, 138 Mass. 165, 179; 52 Am. Rep. 264; *Dickson v. McCoy*, 39 N. Y. 400, 403. See also *Hawks v. Locke*, 139 Mass. 205, 208; 52 Am. Rep. 702. The suggestion has been made, following Mr. Justice Story's statement of the doctrine of Pothier, that bailors for hire generally warrant the suitability of the thing let: *Harrington v. Snyder*, 3 Barb. 380, 381; Story on Bailment, secs. 383, 390. But the common law in general applies the principle of *caveat emptor* when the hirer has examined the article: *Cutter v. Hamlen*, 147 Mass. 471, 475. See further *Hawks v. Locke*, 139 Mass. 205, 208; 52 Am. Rep. 702; *McCarthy v. Young*, 6 Hurl. & N. 329.

The supposed warranty, if it existed, could not be placed on any of the foregoing considerations, but would have to stand on the analogy of carriers or passengers, taking their liability in the strictest form in which it ever has been taken. There have been intimations, if not decisions, in favor of such a view with regard to vehicles let for the known purpose of carrying passengers: *Jones v. Page*, 15 L. T., N. S., 619; *Leach v. French*, 69 Me. 389, 392; 31 Am. Rep. 296; *Harrington v. Snyder*, 3 Barb. 380; *Kissam v. Jones*, 56 Hun, 432, 434. Compare *Francis v. Cockrell*, L. R. 5 Q. B. 501, 503; *Fowler v. Lock*, L. R. 7 Com. P. 272; L. R. 9 Com. P. 751, note; L. R. 10 Com. P. 90. But an opposite decision was reached in *Hadley v. Cross*, 34 Vt. 586; 80 Am. Dec. 699; and in this commonwealth, even, carriers of passengers do not warrant their vehicles, and are not liable, if wholly free from negligence: *Ingalls v. Bills*, 9 Met. 1; 43 Am. Dec. 346; *White v. Fitchburg R. R. Co.*, 136 Mass. 321, 324. See *Readhead v. Midland Railway*, L. R. 2 Q. B. 412; L. R. 4 Q. B. 879. It follows, *a fortiori*, that one who lets a horse does not warrant that it is free from defects which he does not know of, and could not have discovered by the exercise of due care: See Story on Bailment, sec. 391 a; Edwards on Bailments, sec. 873.

Judgment on the verdict.

BAILMENT — WARRANTY BY BAILOR. — A livery-stable keeper is liable to a hirer for an injury which happens by reason of a defect in the vehicle hired, which might have been discovered by the most careful examination; but not for an injury which happens by reason of a hidden defect which could not have been discovered: *Hadley v. Orose*, 24 Vt. 586; 80 Am. Dec. 699, and note. The owner of a rented team is not liable for injury done by it while being driven along a highway, though he was in the vehicle at the time, if there was no active concurrence in the injury on his part: *Hartfield v. Roper*, 21 Wend. 615; 34 Am. Dec. 272.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

BOEHMER V. DETROIT FREE PRESS COMPANY.

[OF MICHIGAN, 7.]

LIBEL — "BOODLE" — MEANING OF. — When a publication charges that a franchise has been procured by the use of "boodle," the only inference is that the persons granting the franchise were, as officials, bribed by money to make the grant. Such publication is libelous.

"BOODLE" IS MONEY FRAUDULENTLY OBTAINED IN PUBLIC SERVICE; especially money given to or received by officials in bribery, or gained by collusive contracts, appointments, or the like.

LIBEL — QUESTION FOR JURY. — When a publication charges a township board with granting a franchise and the officers composing such board, naming them, and a highway commissioner, naming him, with signing it, and then refers to the transaction as suspicious, and to the opinion that "boodle" had been used in obtaining the franchise, it is for the jury to say whether or not from the whole of the article published, the language used applies to the highway commissioner as well as to the township board.

John G. Hawley, for the appellant.

Dickinson, Thurber and Stevenson, for the respondent.

McGRATH, C. J. Case for libel. Plaintiff appeals from a judgment on demurrer.

The declaration sets forth that since May 1, 1891, plaintiff was and is highway commissioner of the township of Hamtramck, in the county of Wayne; that on May 7, 1891, plaintiff, acting with the supervisor, township clerk, and one of the justices of the peace of said township, and composing the township board of said township, granted a franchise to Henry Plass and others to construct and operate a certain railway along the highway known as "Gratiot Road" or "Gratiot

Avenue," in said township; that on June 13, 1891, a portion of the said township, including a portion of said Gratiot Avenue, upon which said railway was to be operated, was annexed to the city of Detroit; that on the thirteenth day of December, 1891, the defendant falsely, wickedly, and maliciously printed, uttered, published, and circulated of and concerning the plaintiff a certain false, wicked, and defamatory libel, in the words and figures following, viz.:—

" 'The Gratiot Avenue Franchise [meaning said franchise.]

" 'It [meaning said franchise] was carefully dissected at a meeting yesterday morning.

" 'The Gratiot Avenue street-car franchise [meaning said franchise] was considered yesterday morning by the committee on streets and ordinances, the board of public works, and city attorney, at a meeting held in the mayor's office. Edwin F. Conely appeared for the railway company, and argued that the city could not alter the contract entered into by the projectors of the road with the township of Hamtramck without the consent of the promoters. He claimed that the franchise was a valid one, and that the city had no control over it, except so far as the general police supervision of the street on which it is proposed to build the line is concerned. It mattered not if the contract contained no restrictions as to the time it was in operation. He said that he would immediately move to have the injunction dissolved.

" 'City Attorney Casgrain said that he had made a careful examination of the franchise, and was of the opinion that it had been legally granted, although it was bad in effect.

" 'Commissioner McVicar scored the township board of Hamtramck for granting the franchise under the circumstances they had. There had been no official notification, he said, given to the board of the existence of the charter. The transaction [meaning the granting of said franchise by said plaintiff and said other persons who acted with him in granting it] appeared to him to be very suspicious, and he was of the opinion boodle [meaning money corruptly paid to and received by a public officer as a bribe] had been used [meaning had been paid by the persons to whom said franchise had been granted to the officers who had granted the same] in the same [thereby imputing and meaning that the plaintiff and the said other officers who acted with him in granting said franchise had corruptly and feloniously accepted and received money for the granting of said franchise, and thereby

imputing and meaning that the plaintiff had been guilty of a felony under the provisions of section 9242 of Howell's Annotated Statutes of Michigan].'

"And the said plaintiff further avers that in the same newspaper and in the same newspaper article in which the foregoing false, scandalous, and defamatory language was contained and published as hereinbefore recited, said defendant further uttered and published of and concerning the said plaintiff the following language, viz.:—

"The franchise [meaning said franchise] is signed by Supervisor Roger Echlin, Richard Giff, Jr., justice of the peace, Columbus Burnett, township clerk, and Wm. Boehmer [meaning said plaintiff], highway commissioner.'"

The declaration alleges that the defendant falsely, maliciously, and wickedly printed, uttered, and published of and concerning the plaintiff a certain false, wicked, and defamatory libel in the words and figures set forth. The declaration does not aver that the language complained of was simply repeated by the defendant, and in view of the averments, we cannot assume that to be the fact. The publication purports to be a report of what was said at the meeting of the committee on streets, but we cannot assume that such was the fact, or, if simply a report, that it was a correct report. The facts, therefore, upon which the claim of privilege is based do not appear.

The word "boodle" is defined as "money fraudulently obtained in public service; especially, money given to or received by officials in bribery, or gained by collusive contracts, appointments, etc.; by extension, gain from public cheating of any kind; often used attributively": See Cent. Dict. In these times, when it is charged that a franchise has been procured by the use of "boodle," there can be but one inference, viz., that the persons granting the franchise were as officials, bribed by money to make the grant. Bribery was an indictable offense at common law, and has been made a felony by statute. The language used is susceptible to the inference that "boodle" was the operating force in the procurement of the franchise.

The publication alleges that the franchise was signed by the supervisor, the justice, the township clerk, and plaintiff as highway commissioner. The publication does not allege that improper inducements were resorted to with any one of the persons named, but generally that "boodle" was used.

In *Welch v. Tribune Publishing Co.*, 83 Mich. 681; 21 Am. St. Rep. 629, it was held that an individual juror had a right of action upon a charge that the jury had perjured themselves: *Byers v. Martin*, 2 Col. 605; 25 Am. Rep. 755; *Robertson v. Bennett*, 44 N. Y. Sup. Ct. 68. The publication charges the township board with granting the franchise, but plaintiff was not a member of the township board. He appears to have joined in the grant. The publication afterwards refers to the transaction as suspicious, and to the opinion that "boodle" had been used in obtaining the same. It is for the jury to say whether, from the whole of the article, the language used applied to plaintiff as well as to the township board.

The declaration is good, and the judgment must be set aside, with costs to plaintiff. Defendant will have twenty days within which to plead.

The other justices concurred.

LIBEL — CHARGING PUBLIC OFFICER WITH ACCEPTING BRIBES. — To impute to an officer in his official capacity a want of integrity, and to charge that he has been induced to act in his official capacity by a pecuniary or valuable consideration is *prima facie* libelous: *Ootulla v. Kerr*, 74 Tex. 89; 15 Am. St. Rep. 819; see extended note to *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 350.

PEOPLE v. HODGKIN.

[94 MICHIGAN, 27.]

SEDUCY. — **EMISSION IS NECESSARY** to the consummation of the crime of sodomy, and, while it may be inferred from proof of penetration and the circumstances of the case, yet it is a fact which the prosecution must prove before a conviction can be claimed.

J. B. Houck and Charles H. McGinley, for the appellant.

A. A. Ellis, attorney-general, and *W. H. Burgess*, acting prosecuting attorney, for the people.

MONTGOMERY, J. The respondent was informed against under section 9292, Howell's Annotated Statutes, and convicted of the crime of sodomy. The circuit judge instructed the jury that the evidence of the offense was complete upon proof of penetration only. The defendant assigns error upon this instruction, which assignment presents the only question which we deem it necessary to consider.

The statute does not, in terms, define what shall constitute the offense. There has been some disagreement in the cases

upon the question of whether proof of emission is necessary to establish the offense at the common law, the two offenses of rape and sodomy having been regarded by some courts as kindred, so far as relates to this question; but, as stated by Mr. Bishop, "though writers generally assume that rape and sodomy stand on common ground, reflection may suggest differences": 2 Bishop on Criminal Law, sec. 1127. In England the question was not fully settled until 1781, when it was held that proof of emission was necessary to the consummation of the offense: *Hill's Case*, 1 East P. C. 439. See *Stafford's Case*, 12 Coke, 87. The American cases are not uniform. The following cases support the claim of the prosecution that proof of penetration only is necessary: *Commonwealth v. Thomas*, 1 Va. Cas. 307; *Comstock v. State*, 14 Neb. 205; *Pennsylvania v. Sullivan*, 1 Add. (Pa.) 143. In North Carolina and Ohio the doctrine that emission is necessary obtains: *State v. Gray*, 8 Jones, 170; *Williams v. State*, 14 Ohio 226; 45 Am. Dec. 536.

The question has never been decided by the supreme court of this state. But the legislature in 1841 enacted a statute, the second section of which reads: —

"Whereas, upon the trials for the crimes of buggery and rape, . . . offenders may escape by reason of the difficulty of the proof which has been required of the completion of those several crimes; for a remedy thereof, be it enacted, that it shall not be necessary, in any of these cases, to prove the actual emission of seed, in order to constitute a carnal knowledge, but that carnal knowledge shall be deemed complete upon proof of penetration only."

By Revised Statutes 1846, p. 730, this statute was repealed. A subsequent statute has been enacted which dispenses with the necessity of proof of emission in rape. It is contended that the effect of the repeal of the statute of 1841 is to revive the common law, and such, we think, is the general rule (Endlich's Interpretation of Statutes, sec. 475), although this rule may perhaps be subject to exception. See *State v. Slaughter*, 70 Mo. 484. But it will be observed that the act of 1841 was a clear legislative recognition of the common-law rule as laid down by the Ohio and North Carolina courts, and we think that the repeal of this statute evinces a purpose to revive the common-law rule as it was then understood to obtain in this state, and should be given force in determining what the common-law rule in this state then was, prior to the enactment of

that statute. We think, therefore, that proof of emission was a necessary ingredient of the offense, and, while it may be inferred from proof of penetration and the other circumstances of the case, yet it is a fact which the prosecution must make out before a conviction can be claimed, and the instruction was therefore erroneous.

Judgment will be reversed, and a new trial ordered. The prisoner will be remanded to the custody of the sheriff of Sanilac County.

SODOMY — RAPE: *Rodgers v. State*, 30 Tex App. 510, decides that penetration, whether with or without injection or emission, is sufficient to sustain a conviction of rape. In Ohio, a statute exists doing away with the necessity of proof of emission: *Hiltabiddle v. State*, 35 Ohio St. 52; 35 Am. Rep. 592; see further *Williams v. State*, 14 Ohio St. 222; 45 Am. Dec. 636, on the question as to whether emission is a necessary element of the crime of rape. See especially the note to *Smith v. State*, 80 Am. Dec. 361, where the cases are collected, discussing the necessity for emission to constitute the crime of rape or sodomy.

MONTROSS v. EDDY.

[94 MICHIGAN, 100.]

BROKERS — RIGHT TO RECOVER COMPENSATION FROM BOTH VENDOR AND VENDER. — A broker who simply brings the parties together, and has no hand in the negotiations between them, they making their own bargain without his aid or interference, can legally receive compensation from both of them, although each is ignorant of his employment by the other.

BROKERS — RIGHT TO RECOVER COMPENSATION FROM BOTH VENDOR AND VENDER. — A commission dealer in lands who simply acts as a go-between to bring the vendor and vendee together to make their own bargain, may recover from either or both such sum as was agreed upon for the services rendered.

Wiener and Draper, for the appellants.

George W. Weadock, for the respondent.

DURAND, J. The plaintiff is a commission dealer in lands, and he brings this suit for services which he claims to have performed for the defendants, in assisting them about the sale, for ninety thousand dollars, of some pine timber lands, to Pitts and Cranage, of Bay City, Michigan.

The plaintiff claims that in 1885 he had these same lands for sale at fifty thousand dollars, and that, being in Bay City in September, 1887, a Mr. Burton, who knew of this fact, and

who represented Pitts and Cranage, asked him if the lands in question had been sold, to which he responded that he did not know, upon which Mr. Burton asked him to find out, and plaintiff told him he would do so; that thereupon he went to Saginaw, and met Walter S. Eddy, the junior member of the firm of C. K. Eddy and Son, the defendants and owners of the timber, where the agreement was made upon which the plaintiff claims the right to recover. The conversation, as shown by his testimony in the record was as follows:—

“I came from Bay City, and met Mr. Eddy right below Moore’s drug store. I asked him if that timber on Hope Creek—we called it the ‘Hope Creek Timber’—was for sale yet, and he said, ‘Yes.’ I said, ‘I have got a party that I don’t know but I can sell it to. I have been talking with them about it.’ And I said, ‘What do you hold it at now?’ He said, ‘Ninety thousand dollars.’ I said, ‘I don’t believe I can do anything with it.’ I said, ‘You have come up big. You advertised it here years ago for fifty thousand dollars, and these parties knew it. You have come up so much I don’t think I can sell it.’ He said he would not take any less for it. I said, ‘Say eighty thousand dollars, and I will try and sell it.’ No, he would not take that. I said, ‘Say eighty-five thousand dollars, and I will try.’ He said no; he would not take less than ninety thousand dollars. Well, I said, if that was the best he could do, I had no thought I could sell it; I didn’t believe I could sell it for ninety thousand dollars. He said he would not take any less. I said, ‘Would I, then, be getting the usual commission if I sell at ninety thousand dollars?’ He said, ‘No; you must get your pay from the other party.’ I said, ‘I wouldn’t ask them for it.’ I said, ‘You know I had it for sale, and I wouldn’t ask them to pay a commission on ninety thousand dollars.’ He said, ‘We don’t want to pay any commission.’ I said, ‘I won’t undertake it’; and he turned to go away from me, and he said, ‘Ben, if you make the sale, we will expect to pay you for it.’ I said, ‘All right.’ I told him they were gilt-edged parties, and he would be perfectly satisfied with the parties when he knew who they were. I said they would make a payment down, and they were gilt-edged parties.

“Q. What did he say?

“A. He said that would be all right.”

After this talk the plaintiff went to Bay City, and told Pitts and Cranage what the purchase could be made for, and they

sent a man with him to examine the pine growing upon the land, and ascertain its amount and value. After four or five days spent in making the examination and estimate, it was reported to Pitts and Cranage, and about September 27, 1887, they concluded the purchase of the land from the defendants at the sum of ninety thousand dollars. Pitts and Cranage then gave the plaintiff five hundred dollars for the services he had performed for them in respect of the purchase. Pitts and Cranage claim that the five hundred dollars was given the plaintiff in payment for his services, while the plaintiff insists that it was a mere gift, and was not in any way to be considered as a payment; but, in the view we take of the case, we do not consider that this is of any importance.

On the day the sale was consummated, the plaintiff went to the office of the defendants, in Saginaw, and after a consultation with each other they gave him their check for two hundred and fifty dollars; and the plaintiff asked them, "Is that all for selling that land?" and Walter S. Eddy, one of the defendants, answered, "That is all we will pay you now." After this time the plaintiff again asked them for money, and was answered that they had no money to spare. Again, in September, 1888, he asked the same defendant for more money, when he was answered that defendants were hard up. Upon giving his note, however, for sixty or ninety days, the defendants gave him their check for one hundred dollars, at which time he was told that they did not want him to come for any more money. The plaintiff claims that he was never asked to pay this note, although the defendant's claim that they sent him a letter asking him for payment, and that the plaintiff had promised to pay the one-hundred-dollar note subsequent to its maturity. There was no other demand made by the plaintiff for the claim in controversy until shortly before this suit was begun.

The defendants deny that they ever employed the plaintiff to sell their land, or that they promised to pay him anything for the sale, and claim that Pitts and Cranage employed the plaintiff to buy the land, and agreed to and did pay him for his services, and that plaintiff so informed the defendants. They also claim that they were never asked by plaintiff for compensation only shortly before bringing this suit, and that the two hundred and fifty dollars they paid the plaintiff was a gratuity from them; that they were under no obligation to pay it; and that the one hundred dollars given at

the time the note referred to was given, was a loan by them to the plaintiff. The plaintiff introduced testimony tending to show that his services were worth five per cent on the selling price of the land, but on cross-examination it was shown that commissions run as low as one per cent on the purchase price of large transactions.

The case was submitted to the jury, who brought in a verdict for the plaintiff for two hundred and fifty dollars.

The defendants contend that under the contract, just as plaintiff testifies to it, before he can recover anything, he must show performance on his part, and that he has failed to do so in this case. This matter was fairly submitted by the circuit judge to the jury, who by their verdict must have found that the plaintiff's version of the conversation with Walter S. Eddy in relation to the sale of this land was a correct one, and that he did promise plaintiff that if he effected the sale at ninety thousand dollars the defendants would pay him for it. They must also have found that the plaintiff performed his portion of the agreement, and was the instrument who brought about the sale to Pitts and Cranage. The circuit judge instructed the jury that the plaintiff was in no event entitled to recover on the basis of commission; that there had been no agreement to pay him a commission; but that, if the jury believed that the defendants agreed to pay him for his services in making the sale, then the law assumed simply an agreement to pay him what those services were reasonably worth. The small amount found by the verdict of the jury shows that they were governed by the charge of the judge in the matter, and that they did not find a verdict on the basis of commissions. There being, upon both the making of the agreement, as stated, and also upon the performance of that agreement by the plaintiff, sufficient evidence to entitle the plaintiff to go to the jury, we cannot disturb their verdict, even if we had the inclination to do so.

Objections were made by the defendants to certain questions asked by plaintiff's counsel upon the cross-examination of Mr. Cranage, one of the defendants' witnesses, in reference to a conversation with the plaintiff about the amount of pine upon the land, and also as to whether the five hundred dollars given to the plaintiff by Pitts and Cranage was a present, and was to be returned upon certain conditions. Objection was also made by the defendants to the question put to the plaintiff as to whether or not, in the talk with Mr. Cranage

about the time this suit was begun, Mr. Cranage had said that he knew nothing that would help or hurt either side, only he knew that the Eddys ought to pay well for it; that it was the worst deal that they ever had; but which objections were overruled, and the testimony received.

If there was error in the ruling of the court upon these propositions in relation to the admission of this testimony, we think it was error without prejudice. The verdict of the jury would seem to indicate they were not prejudiced by anything that Mr. Cranage had said in reference to the question. And as to whether the payment by Pitts and Cranage to the plaintiff of five hundred dollars was a present, or was paid under an agreement made by them for his services, we deem it immaterial. If the defendants are liable at all, it is upon their agreement to pay the plaintiff for his services if he made a sale of this land at ninety thousand dollars. Nothing was left to his discretion. He had nothing to do with the price. He had simply to find a purchaser willing to give the price asked, and it can be of no importance whatever to the defendants whether or not those purchasers also paid the plaintiff for any services he may have rendered them. As was said in *Ranney v. Donovan*, 78 Mich. 318:—

“A broker who simply brings the parties together, and has no hand in the negotiations between them, they making their own bargain without his aid or interference, can legally receive compensation from both of them, although each was ignorant of his employment by the other.”

All that the plaintiff was to do was to find a purchaser at a certain sum fixed and agreed upon. Neither his efforts nor judgment were to be employed to get a greater price. When he did this, and the sale brought about by him as middleman was consummated, he was entitled to a reasonable compensation for his services, if the jury believed his version of what the contract was, as they evidently did do. If the plaintiff made any misstatements to Pitts and Cranage in reference to the amount of pine on the land, or to its quality, and thereby induced them to pay the sum asked for it by the defendants, certainly the defendants cannot complain; nor can they be heard to say that, because Pitts and Cranage paid or gave plaintiff five hundred dollars for services performed by him in bringing about the purchase, therefore they are relieved from paying him, if they agreed to do so. He was simply acting as a go-between to bring the buyers and sellers together,

to make their own bargain. This is all he did do, and either or both parties, in such a case, would be legally bound to pay such sum as was agreed upon for the services rendered.

We do not find any prejudicial error in the case.

The judgment will be affirmed, with costs of this court to the plaintiff.

BROKERS. — WHEN MAY RECOVER COMPENSATION FROM BOTH PARTIES: See notes to *Herman v. Martineau*, 60 Am. Dec. 370; *Rupp v. Sampson*, 77 Am. Dec. 418, and extended note to *Walker v. Osgood*, 93 Am. Dec. 177; also, note to *Ward v. Cobb*, 12 Am. St. Rep. 590. An agent to sell lands, having found a purchaser, and having, with the vendor's knowledge, signed the contract of purchase on behalf of the vendee, may still recover his commissions from the vendor: *Barry v. Schmidt*, 57 Wis. 172; 46 Am. Rep. 35, and especially note. An agent for the sale of property cannot at the same time act as agent for the purchase thereof, or so interest himself therein, as to entitle himself to compensation from both vendor and vendee, for to so permit him to act would be against public policy: *Rice v. Davis*, 136 Pa. St. 439; 20 Am. St. Rep. 931, and note; *Walker v. Osgood*, 98 Mass. 348; 93 Am. Dec. 168. A broker cannot act in the capacity of agent for both buyer and seller, and receive commissions from both, unless he should so act with the full knowledge and consent of both parties: *Armstrong v. O'Brien*, 83 Tex. 635; and in the following cases it was held that under those circumstances he could not recover from either: *Farnsworth v. Hemmer*, 1 Allen, 494; 79 Am. Dec. 756, and note; *Bell v. McConnell*, 37 Ohio St. 396; 41 Am. Rep. 528; *Rice v. Wood*, 113 Mass. 133; 18 Am. Rep. 459.

HASSE v. AMERICAN EXPRESS COMPANY.

[94 MICHIGAN 122.]

EXPRESS COMPANIES — LIABILITY FOR GOODS SENT C. O. D. — When goods are sent by express C. O. D. the liability of the express company as a common carrier is to safely carry the goods to their destination, notify the consignees of their arrival, and to offer delivery upon payment of the amounts, and when such duty is fully performed its liability as a common carrier terminates. If the consignees are not ready to receive and pay for the goods, it is the further duty of the company to safely store, care for, and hold them a reasonable time to enable the consignees to pay and then notify the consignor. The liability of the express company, meanwhile, is that of a warehouseman only.

EXPRESS COMPANIES — LIABILITY FOR GOODS SENT C. O. D. — Consignors sending goods by express C. O. D. must expect the express company to retain the goods in order to give the consignees an opportunity to pay for and take them, and in the meantime to store them in its warehouse, and if the goods are destroyed while so stored, the express company cannot be held to the strict liability of a common carrier, but only as a warehouseman.

H. C. Wisner, for the appellant.

Henry A. Chaney, for the respondents.

GRANT, J. June 8, 1891, plaintiffs, who are clothiers in the city of Detroit, delivered a parcel of clothing to the defendant for carriage to Marquette, Michigan, addressed to one McMillan, marked "C. O. D. \$30.00." On June 10th they delivered another parcel, addressed to one Wick, Marquette, "C. O. D. \$35.00." June 16th they delivered another package addressed to one Hart, Marquette, "C. O. D. \$62.00." Each of these packages reached Marquette on the day following its receipt by the defendant. Its agent at Marquette, immediately on receipt of the first two packages, took them to the residences of McMillan and Wick in Marquette for delivery upon payment of the amounts to be collected. They were traveling men, and were not at home. Hart was unknown to defendant's agent, and had no residence in Marquette. Defendant's agent thereupon sent a notice by mail to Hart at Marquette of the arrival of the package. These packages were then safely stored in the defendant's warehouse. June 19th McMillan and Wick went to defendant's office in Marquette, and each notified its agent to hold the package addressed to him until June 25th, when he would pay the amount and take the same. Hart never appeared in answer to the notice sent to him. June 19th defendant's agent at Marquette mailed three notices to plaintiffs at Detroit, notifying them that the first two packages remained in the office unpaid, for the reason that each party said he would take it about the 25th, and that the last package remained in the office unpaid, for the reason that the consignee was unknown to defendant, and that the notice sent to him by mail failed to bring him. These notices were received by the plaintiffs June 20th. On the night of June 19th defendant's storehouse was destroyed by fire, without fault upon its part, and these parcels sent by plaintiffs were destroyed. Plaintiffs sued the defendant as a common carrier, and verdict was directed in their favor by the court.

The defendant's contract as common carrier was to safely carry the goods to their destination, to notify the consignees of their arrival, and to offer delivery upon payment of the amounts. This duty it had fully performed, and with such performance its liability as a common carrier terminated. Its further duty was to safely store and care for the goods, hold them a reasonable time to enable the consignees to pay, if they were not ready to pay immediately, and then to notify the consignor. The liability meanwhile was that of ware-

houseman: Hutchinson on Carriers, sec. 392; *Weed v. Barney*, 45 N. Y. 344; 6 Am. Rep. 96; *Zinn v. New Jersey Steamboat Co.*, 49 N. Y. 442; 10 Am. Rep. 402; *Adams Express Co. v. Darnell*, 31 Ind. 20; 99 Am. Dec. 582; *Marshall v. American Express Co.*, 7 Wis. 1; 73 Am. Dec. 381.

In *Weed v. Barney*, 45 N. Y. 344, 6 Am. Rep. 96, the goods were sent C. O. D., arrived at their destination March 17th, the consignees were promptly notified, and promised to take and pay for them, and the goods remained in the storehouse until April 16th, when they were destroyed by an explosion without the fault of the defendants. No notice had meanwhile been given to the consignor. It was held that no notice was essential.

It is a matter of common knowledge that those sending goods by express with instruction to collect their value before delivery expect express companies to retain them in order to give the consignees an opportunity to pay for and take the goods. Consignors so sending goods understand that the goods must be deposited in the storehouses of these companies. There is no reason, under such circumstances, in holding these companies to the strict liability of common carriers. We think that under the agreed facts in this case the defendant is not liable.

Judgment reversed, and judgment entered here for the defendant, with costs of both courts.

CARRIERS — WHEN LIABLE AS WAREHOUSEMEN. — A package marked "C. O. D." was delivered to an express company to be conveyed to San Francisco. The company carried it, tendered it to the consignee, and demanded payment. The consignee said he would receive the package and pay some other time. The tender of the package and the demand of payment were made several times, until finally the package was destroyed in the warehouse of the carrier without its fault. It was held that the carrier was liable as a warehouseman only: *Weed v. Barney*, 45 N. Y. 344; 6 Am. Rep. 96. See note to *Lancaster Mills v. Merchants' etc. Co.*, 24 Am. St. Rep. 613, where the cases discussing when the liability of a carrier becomes that of a warehouseman are collected; also note to *Union Pac. R'y Co. v. Moyer*, 10 Am. St. Rep. 185. After a carrier has transported goods, given notice of their arrival to the consignee, and a reasonable opportunity to take them away, he thereafter holds them simply as a warehouseman: *Wilson v. California etc. R. R. Co.*, 94 Cal. 166; *Draper v. President etc.*, 118 N. Y. 118.

McDONALD v. MALTZ.

[94 MICHIGAN, 172.]

BROKERS — RIGHT TO RECOVER COMPENSATION FROM BOTH VENDOR AND VENDEE. — When the same person acts as agent on commission for both the vendor and vendee in the sale and purchase of land, neither knowing that such agent is acting for the other, and both relying upon his knowledge as to the value of the land, he cannot, after receiving a commission from the vendor, also recover commissions from the vendee.

J. D. Turnbull, for the appellant.

W. E. Depew, and McKnight, Humphrey, and Grant, for the respondent.

LONG, J. This case was in this court at the October term, 1889, and is reported in 78 Mich. 685, when the judgment was reversed and a new trial ordered. The cause has again been tried, and under the direction of the court, judgment entered in favor of the defendant.

The facts are fully set out in the former opinion, and do not materially differ from those appearing in the present record. The plaintiff had been acting as the agent of Charles L. Ortman at different times in the sale of land. He met Ortman in Detroit, and commenced negotiations with him for the sale of certain lands, out of which commissions are claimed from the defendant in the present case. Ortman asked twenty-seven thousand dollars for them. After going over the lands with Ortman's agent, he convinced Ortman that they were worth seventeen thousand dollars only, and Ortman agreed that he might sell them at that figure on commission. After some talk with defendant about these lands, a bargain was closed, by which defendant agreed to take them at the figures fixed by plaintiff, and at which Ortman agreed they might be sold. This suit is brought to recover from the defendant commissions which plaintiff claims he agreed to pay. The agreement, as plaintiff claims it, was, that for certain tracts he was to receive one thousand dollars commission, and for the balance of it defendant was to purchase for him two forty-acre tracts of land from Mr. Pack, which were of the value of about two hundred dollars.

When the case was in this court upon the former hearing it was held that the agreement claimed by plaintiff, that the defendant was to purchase for him these two forty-acre tracts, was void under the statute of frauds. That question was there disposed of, and need not be discussed here. It is

claimed by plaintiff, however, that the question of his right to recover the claimed commission of one thousand dollars was also passed upon and settled in favor of his contention. On the other hand, it is claimed by the defendant that the question of the commissions, aside from the deed of the two forty-acre tracts, was not necessarily passed upon, and was not at all discussed in that case. It appears from the former opinion that the case was reversed, when here before, upon the sole ground that a part of the contract relied upon by plaintiff was void under the statute of frauds, the other questions now raised not being discussed or passed upon.

From the showing before us in the present record it appears that the plaintiff did not disclose to Mr. Ortman that he was getting from defendant any commission, and that Ortman paid him a commission of five hundred twenty-five dollars. Plaintiff says that, in his talk with defendant, he was to get the land at as low a figure as possible, if defendant went in with him, and he was to have for his share the one thousand dollars and the deed of the two forties. He also testifies that defendant asked him how much commission he was getting out of that, and he told defendant that was his business and not the defendant's. At that time he had a letter from Ortman in reference to the lands, and showed it to the defendant, but turned down the part of it relating to commissions, so that defendant could not see it. From the whole record it appears that the plaintiff was not only receiving commissions from Ortman, which was unknown to defendant, but was also at the same time making a bargain for an interest in the land and for commissions from the defendant. He was making representations to Ortman that the land was not worth the amount which he (Ortman) claimed, and at the same time representing to the defendant that it was worth more than they were paying for it. It is evident from the facts shown that the defendant, as well as Ortman, was relying to some extent upon plaintiff's judgment as to the value of the lands. He was acting as the agent of Ortman in their sale, and at the same time making a bargain with defendant for their purchase, and asking commissions from him, without disclosing his relations with Ortman, from whom he was also getting a commission.

The facts appearing in the record, and undisputed, bring the case out of the rule laid down in *Ranney v. Donovan*, 78 Mich. 318, 329, and cases there cited. There the plaintiff

was simply the go-between or middleman, and the court put his right to recover expressly upon the ground that no confidence was reposed in him by either party that he would exert his skill and judgment to get the land at a lower price or sell it for a larger sum. All he did was to bring the buyer and seller together, and they made their own bargain.

In *Scribner v. Collar*, 40 Mich. 375, 29 Am. Rep. 541, the plaintiff, as agent, was retained by different persons on commission to negotiate sales or exchanges of their property, and he brought about an exchange between two of them, neither knowing he was acting for the other. The action was brought to recover commissions. It was said:—

“The opinion has been expressed that where the person is employed merely as a middleman to bring persons together, and has no duty in negotiation, and has not employed his skill, his knowledge, or his influence, he may lawfully claim pay from both parties: *Rupp v. Sampson*, 16 Gray, 398; 77 Am. Dec. 416; *Siegel v. Gould*, 7 Lans. 177. No doubt such cases may occur, but their exceptional character should appear clearly before they should be exempted from the general principle. . . . But the cases are nearly, if not quite, uniform, that where the double employment exists, and is not known, no recovery can be had against the party kept in ignorance; and the result is not made to turn upon the presence or absence of designed duplicity and fraud, but is a consequence of established policy.”

It is not necessary to rest the present case upon the question of public policy alone, as it is evident that the parties upon both sides were placing some reliance upon the judgment and skill of plaintiff as to the amount of timber upon the land, and its value. Under such circumstances, good faith to the defendant required that the agent should disclose fully to him his relations with Mr. Ortman: *Moore v. Mandlebaum*, 8 Mich. 443; *Everhart v. Searle*, 71 Pa. St. 259; *Bell v. McConnell*, 37 Ohio St. 399; 41 Am. Rep. 528; *Cottom v. Holiday*, 59 Ill. 179; *Meyer v. Hanchett*, 39 Wis. 423; *Collins v. McClurg*, 1 Col. App. 348; *Oscanyan v. Arms Co.*, 103 U. S. 271.

The judgment must be affirmed, with costs. ✓

**BROKERS — RIGHT TO RECOVER COMMISSIONS FROM BOTH VENDOR AND VEE-
DER.** — For a discussion of this question, see *Montross v. Eddy*, 94 Mich. 100;
note 323, and note.

VAIL v. WINTERSTEIN.

[94 MICHIGAN, 280.]

MARRIED WOMEN — RIGHT TO BECOME PARTNERS. — Married women, while incompetent to enter into partnership engagements with their husbands, are free to enter into partnership relations with third parties, and thus bind their separate properties and estates for the partnership debts.

George McKay, for the appellants.

George W. Weadock, for the respondent, *Alice A. Tallmadge*.

LONG, J. The complainants, Henry W. Wilson and William A. Vail, entered into a copartnership with defendants, Alice A. Tallmadge and Warren Winterstein; under the firm name of Winterstein, Vail & Co., for the purpose of carrying on a general banking business at Marlette, this state. They organized January 1, 1888, and under the terms of the copartnership agreement, were to continue to January 1, 1893. They contributed capital stock as follows: Henry W. Wilson, two thousand dollars; William A. Vail, three thousand dollars; Alice A. Tallmadge, three thousand dollars; and Warren Winterstein four thousand dollars; making a capital stock of twelve thousand dollars. Winterstein becoming the president, and Vail the cashier and bookkeeper. March 30, 1891, a bill was filed in the circuit court in chancery for Sanilac County by Vail and Wilson against the defendants Winterstein and Tallmadge, and others, to whom it was alleged conveyances and transfers of firm property had been made in violation of the rights of Vail and Wilson, and the creditors of the firm. A receiver was asked for. Immediately after the filing of the bill a common-law assignment was made by Vail and Wilson in the name of the firm to Thomas U. Dawson, one of the complainants here, of all the firm property for the benefit of all the firm's creditors. In making the assignment Vail and Wilson assumed that the other members of the firm had disposed of their interests in the firm property, and were by such acts disqualified to act for the firm in any capacity, and that their transferees had no authority to act. An amended bill was subsequently filed by Vail and Wilson, and Dawson, the assignee, and joining as defendants with the others, John J. Lunau, a transferee of a part of the firm's real estate, and Annie, the wife of Warren Winterstein. A stipulation was thereafter made dismissing the bill as to Margaret J. Winterstein, Johnson Winterstein, and John J.

Lunan. Proofs were taken, and a decree entered reciting in substance that the firm of Winterstein, Vail & Co. had been dissolved by the acts of the partners, and appointing complainant Dawson as receiver. It also recited that certain properties which it had been attempted to transfer to other parties belonged to the firm, and also that Alice A. Tallmadge, at the time of the execution of the partnership agreement was a married woman, and still so continued. It was therefore decreed that the copartnership be dissolved, placing all the properties in the hands of the receiver, with the right to sue and collect all the notes, bills, and choses in action belonging to the firm, and to collect the rents and avails of all the real estate belonging to the firm; and that Warren Winterstein execute, acknowledge, and deliver to the receiver an assignment of all the personal property belonging to the firm, and that he and his wife make certain conveyances to the receiver; and for an accounting to be made. The bill was thereupon dismissed, without costs, as to the defendant Alice A. Tallmadge.

This appeal raises but the one question whether the defendant, Alice A. Tallmadge, being a married woman, could become a member of the firm of Winterstein, Vail & Co., and by such act bind her separate property, so that in the accounting for the benefit of creditors she would become liable out of her separate estate to the creditors of the firm.

Section 5, article 16, of the constitution of this state provides that: "The real and personal estate of every female, acquired before marriage, and all property to which she may afterwards become entitled by gift, grant, inheritance or devise, shall be and remain the estate and property of such female, and shall not be liable for the debts, obligations, or engagements of her husband, and may be devised or bequeathed by her as if she were unmarried."

Section 6255, Howell's Annotated Statutes provides that: "The real and personal estate of every female, acquired before marriage, and all property, real and personal, to which she may afterwards become entitled by gift, grant, inheritance, devise, or in any other manner, shall be and remain the estate and property of such female, and shall not be liable for the debts, obligations, and engagements of her husband, and may be contracted, sold, transferred, mortgaged, conveyed, devised, or bequeathed by her in the same manner and with the like effect as if she were unmarried."

It was held in *Edwards v. McEnhill*, 51 Mich. 165; *Bassett v. Shepardson*, 52 Mich. 3; and *Artman v. Ferguson*, 73 Mich. 146; 16 Am. St. Rep. 572; that a married woman could not become a partner in business with her husband, and make her separate estate liable upon the contracts and engagements of the firm. In the last-named case it was attempted to subject Mrs. Ferguson's separate estate to the payment of the firm's debts and liabilities, the firm being composed of herself and her husband. It was said in that case:—

“A partnership is a contract of two or more competent persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, and to divide the profit and bear the loss in certain proportions. That a married woman may, when she has separate estate, be a co-partner with a person other than her husband, is held in many states under the married woman's statutes. But where the statute gives her no power, or only a limited power, to become a partner, the rule of the common law prevails, and she cannot enter a firm.”

Great stress is laid by defendant's counsel upon the last clause before quoted, he insisting that the court intended to hold in that case that a married woman in this state could not become a member of any firm and incur liability binding upon her separate estate. That question was not involved in the case, which related solely to her ability to bind her separate estate in the firm in which her husband was a partner. The reason given for the holding was that it was the purpose of these statutes to secure to a married woman the right to acquire and hold property separate from her husband, and free from his influence and control, and if she might enter into a business partnership with him, it would subject her property to his control in a manner wholly inconsistent with the separation which it was the purpose of the statutes to secure, and might subject her to an indefinite liability for his engagements; that the important and sacred relations between man and wife, which lie at the very foundation of civilized society, are not to be disturbed and destroyed by contentions which may arise from such community of property, and a general power of disposal, and a mutual liability for the contracts and obligations of each other.

The question presented by the present record has not been directly disposed of by any of our previous decisions, and the reasons which have been given why a wife may not be-

come a member of a firm with her husband under our statutes are not at all applicable to cases where she seeks to enter a firm conducting business separate from her husband. As was said in the former case, in many of the states married women are permitted to carry on business in this way, and under statutes quite analogous to our own. The statute of Massachusetts provides: "Any married woman may, while married, bargain, sell, and convey her real and personal property which may now be her sole and separate property, or which may hereafter come to her by descent, devise, bequest, or gift of any person except her husband, and enter into any contract in reference to the same, in the same manner as if she were sole." Stats. 1857, c. 249, sec. 2.

Section 7, chapter 804, Statutes 1855, of that state, provides: "Any married woman may carry on any trade or business, and perform any labor or services, on her own sole and separate account."

It was held under these statutes in *Lord v. Parker*, 8 Allen, 127, that a married woman could not enter into a contract of copartnership with her husband. In *Plumer v. Lord*, 5 Allen, 460, it was held that, while she could not enter into a firm where her husband was a partner, yet she might engage in business with others as partners. Many of the other states, under quite similiar statutes, while holding that a married woman could not be a partner in a firm with her husband, have likewise determined that she might engage her services and property in copartnership undertakings with third parties.

The statutes of Massachusetts and of many other states expressly confer upon married women the right to carry on trade or business and perform labor or services on their sole and separate accounts. We have no such statutory provision conferring express power; but from the earliest cases since the passage of the married woman's act in 1855, our statutes have been interpreted as giving power to married women to carry on business or trade in their own names and upon their sole accounts: *Tillman v. Shackleton*, 15 Mich. 447; 93 Am. Dec. 198; *Campbell v. White*, 22 Mich. 178; *Powers v. Russell*, 26 Mich. 179; *Rankin v. West*, 25 Mich. 195. If a married woman may carry on a business in her own name, and appoint agents who may make contracts for her and in her name, we see no reason why these statutes should be interpreted as restrictive of her right to enter a firm as a partner with others aside from her husband, and thus bind

her separate property for such firm's undertakings, as partners in a firm are the agents of each other in a transaction of partnership affairs; and it is conferring no more power upon the partner to bind the sole and separate property of a married woman than such married woman would have the right to contract for through any other agency. We think the great weight of authority under statutes quite similar to our own is, that married women, while incompetent to enter into partnership engagements with their husbands, are free to enter into partnership relations with third parties, and bind their separate properties as fully and to the same extent as they might do through any other agency, where they carry on business upon their sole and separate accounts.

The rule is stated as follows in 1 Bates on Partnership, sec. 136: "Where statutes give a married woman power to sell and contract as to her separate property, and carry on business, she may invest it in a partnership, since this is a usual way of carrying on business; and it is no objection that she thereby becomes liable for the acts of others, for the same happens if she owns stock in a company, or employs an agent. Her separate property is still hers, and does not become liable for her husband's debts."

Harris on Contracts of Married Women, sec. 511, also lays down the following proposition: "If the legislature has conferred upon the married woman the full, complete, and free power to carry on a separate trade or business that seems to carry with it, by necessary implication of law, the right to conduct such business upon the same principles, the same system, in the same manner, to the same extent, and at her own option, as fully and freely as any other person, and to say that she cannot form a partnership would be to deny her a valuable right in business relations which is allowed to other persons. It will not do to say that she is a sole trader, with all the power in relation to her trade and business that she would have if a *feme sole*, unless she has the liberty to exercise an unrestricted option as to the mode of carrying on such business, provided there be no fraud perpetrated on others. It has been insisted by some that if she forms a partnership, she becomes by that relation liable as a partner, and is bound by the debts either contracted by herself or another member of the firm, and this would often subject her property to the debts and liabilities of another person; but I can see no good reason consistent with the full power as a

sole trader why she should not enter into a partnership in business if she thinks her separate interests would be promoted thereby."

The court below was therefore in error in dismissing the bill as against Mrs. Tallmadge. In other respects, the bill will stand, and an accounting had as provided under the decree; the bill to stand against Mrs. Tallmadge the same as the other defendants. The bill having been dismissed as to the defendants Margaret J. Winterstein, Johnson Winterstein, and John J. Lunau, under stipulation between the parties, the decree will not be disturbed as to them.

The decree of the court below, with these modifications, will be affirmed, and the case remanded to the court below for the purpose of taking an accounting. Complainants will recover their costs of this court.

POWER OF MARRIED WOMEN TO BE PARTNERS. — This question is thoroughly discussed in a monographic note to *Board of Trade v. Hayden*, 31 Am. St. Rep. 934; *Artman v. Ferguson*, 73 Mich. 146; 16 Am. St. Rep. 572. The question is also fully considered in *Fuller v. McHenry*, 83 Wis. 573. In that state a statute had changed a wife's "former equitable ownership of her separate estate into a legal one," and it was insisted that this change in the law had made it possible for her, as to such property, to embark in a partnership with her husband. It was admitted by the court, "under this statute, that the contracts of a married woman, when necessary or convenient to the proper use and enjoyment of her separate estate, are binding at law, and that all her other contracts and engagements stand, as before the statute, good only in equity, and that the change from an equitable to a legal estate has not, in respect to such other contracts, enlarged her powers or removed the disability of coverture. The power of a married woman to bind herself at law is a restricted one and limited to the making of such contracts and engagements as are necessary or convenient to the use and enjoyment of her separate estate." That the statute had authorized the forming a business partnership between husbands and wives was, however, emphatically denied, the opinion of the court on this topic being expressed as follows: —

"The making of such an engagement by the wife might be, if put in execution, a conversion of her separate estate into that of her husband. Certainly, it is easy to understand that, with his influence and control as husband, such result would be almost inevitable. The principal purpose of the statute is to give the wife the power and rights of a *feme sole* as to her separate property, free 'from the disposal of her husband,' and 'not liable to his debts.' Manifestly, it was not intended that the act should receive a construction that would be subversive of the beneficent purposes for which it was enacted, and which would almost necessarily tend to strike down the protection it was intended married women should have under it in the use and enjoyment of their separate estates. At common law a married woman was incapable of forming a partnership, and the marriage of a *feme sole* partner worked a dissolution of the firm. Story on Partnership, sec.

10, 306; 1 Bates on Partnership, sec. 135-141. Her right to enter into a partnership, if she has a separate estate, with a person other than her husband, is quite generally recognized, and is assumed to exist in *Merchant's Nat. Bank v. Raymond*, 27 Wis. 569; but we are not aware of any case where it has been held, under a statute in substance the same as our own, that she may embark her separate estate in partnership ventures with her husband.

"In the case of *Swan v. Caffé*, 122 N. Y. 308, it was held that the common-law disability of a married woman to engage in a business as a copartner or jointly with her husband, was removed by an act, 'Concerning the liability of husband and wife,' which authorized a married woman to carry on any trade or business on her sole and separate account, and that the wife could not escape liability for debts contracted in a partnership with her husband, on the ground of coverture; but the statute in question is much broader than ours, and is unconditional. The case was decided by a mere majority, — three of the judges dissenting, — and is contrary to previous decisions of the supreme and superior courts, and would seem to be in conflict with *Hendricks v. Isaacs*, 117 N. Y. 411; 15 Am. St. Rep. 524. The view we have taken of the statute is sustained by *Lord v. Parker*, 3 Allen, 127; *Lord v. Davidson*, 3 Allen, 131. *Edwards v. Stevens*, 3 Allen, 315; *Plumer v. Lord*, 5 Allen, 463; *Bowker v. Bradford*, 140 Mass. 521; *Payne v. Thompson*, 44 Ohio St. 192; *Haas v. Shaw*, 91 Ind. 384, 390; 46 Am. Rep. 607; *Scarlett v. Snodgrass*, 92 Ind. 262; *Artman v. Ferguson*, 73 Mich. 146; 16 Am. St. Rep. 572; *Bassett v. Shepardon*, 52 Mich. 3; *Carey v. Burruss*, 20 W. Va. 571; 43 Am. Rep. 790; *Cox v. Miller*, 54 Tex. 16; *Bradstreet v. Baer*, 41 Md. 19. It is not to be supposed that the legislature intended that such relations and duties as exist between copartners in trade should be devolved on husband and wife, with their necessary incidents, as a possible means of disturbing domestic peace and confidence, or that they might become contentious litigants in an action to wind up, with a receiver in charge of their affairs and resources. The statute evidently intended that the gains the wife should make in the exercise of her limited business powers should be her sole and separate property, and not be in any way subject to the interference, control, or disposal of her husband. The conclusion at which we have arrived is not in conflict with *Kroustok v. Shontz*, 51 Wis. 204, 37 Am. Rep. 817, where the real estate upon which farming was conducted by husband and wife was her sole property, and she was held liable for that reason. No partnership was claimed to exist. Nor is it opposed in principle to *Arndt v. Harshaw*, 53 Wis. 269; *Dayton v. Walsh*, 47 Wis. 113; 32 Am. Rep. 757; *Brickley v. Walker*, 68 Wis. 564; and *Barker v. Lynch*, 75 Wis. 624; which are clearly distinguishable from the present case. The necessary result is that there was no copartnership estate or liabilities of Hanson & Co., and all the property and liabilities were those of the husband."

COOPER v. LANSING WHEEL COMPANY.

[94 MICHIGAN, 272.]

CONTRACTS — CONTINUING OFFER TO SELL. — When a proposition to sell is made to be accepted within a given time, it constitutes a continuing offer which, however, may be retracted at any time. But if at any time before it is retracted, it is accepted, such offer and acceptance constitute a valid contract.

UNILATERAL CONTRACTS, WHEN BINDING. — In suits upon unilateral contracts, the defendant is held bound if he has had the benefit of the consideration for which he has bargained.

CONTRACTS — PROPOSITION TO SELL WHEN DEEMED ACCEPTED. — When a carriage manufacturer gives an order for such quantity of wheels as he may require during a certain season at a specified price, and the order is accepted by the orderer and one or more lots of wheels are furnished thereunder, the order becomes a valid and binding contract for the entire season.

Q. A. Smith, for the appellants.

Cahill and Ostrander, for the respondent.

MONTGOMERY, J. This is an appeal from a judgment sustaining a demurrer to plaintiffs' declaration.

The first count of the declaration alleges an agreement "whereby the said defendant did undertake, promise, and agree, to and with the plaintiffs, to furnish, sell, and deliver to said plaintiffs all such number or quantity of wheels, . . . at and for an agreed price, . . . as said plaintiffs should or might require or want, during the season of the year 1890, in their said business of manufacturing"; that during the season of 1890 plaintiffs agreed to order, and did order, of defendant, all of such wheels as they might or should want or require in their said business; that certain orders so given were filled, and that certain other orders given in November and December, 1890, defendant refused to fill.

The second count sets forth a written agreement, which is as follows: —

"Owosso, MICH., Dec. 16, 1889.

"MESS. LANSING WHEEL Co., Lansing, Mich.

"*Gentlemen:* Please enter our order for what wheels we may want during the season of 1890, at following prices and terms: B, \$6.00; C, \$5.00; D, \$4.00, — per set, f. o. b. Owosso, 30 days. All the wheels to be good stock, and smooth. Should we want a few D wheels to be extra nice stock, all selected white, they are to be furnished at same price, not to exceed 10 set in a 100.

"Very respectfully yours,

"OWOSSO CART Co."

Upon receipt of this instrument, defendant indorsed thereon the following: "Accepted. Lansing Wheel Co." Then follow the allegations as to the giving and filling of certain orders, and the refusal to fill certain other orders which were given.

The defendant demurred to this declaration, the substantial ground of demurrer being that there was no mutuality of contract between the parties.

It was early held in England that a proposition to sell goods at a certain specified price, and to give the offeree a stated time in which to accept or reject the offer, did not make a binding contract which could not be withdrawn before acceptance. See *Cooke v. Oxley*, 3 Term Rep. 653. The doctrine of this case has not, however, remained unchallenged. Mr. Story, in his work on sales, expresses the opinion that the rule is unjust and inequitable: Sec. 127. He contends that the grant of time to accept the offer is not made without consideration. He suggests as one sufficient legal consideration the expectation or hope of the offerer, and further suggests that the making of such an offer might betray the other party into a loss of time and money, by inducing him to make examination, and to inquire into the value of the goods offered, and this inconvenience assumed by him is a sufficient consideration for the offer.

There is much force in this reasoning, but it has not prevailed to abate the doctrine of *Cooke v. Oxley*, 3 Term Rep. 653, further than this: That it is now generally held that if a proposition be made, to be accepted within a given time, it constitutes a continuing offer, which, however, may be retracted at any time. But if, at any time before it is retracted, it is accepted, such offer and acceptance constitute a valid contract. It was therefore within the power of defendant, in the present case, on the authority of the cases cited, to withdraw the offer made at any time before the plaintiffs had acted upon it.

Authorities may be found which go further than this. The case of *Bailey v. Austrian*, 19 Minn. 535, holds that a contract by which defendant agreed to supply plaintiffs with all the pig iron wanted by them in their business until December 31st next ensuing, at specified prices, and the plaintiffs simultaneously promised to purchase of defendant all of the iron which they might want in their said business during the time mentioned, at said prices, is not a mutual contract which can be enforced, on the ground that the plaintiffs did

not engage to want any quantity whatever. The same court in *Tarbox v. Gotzian*, 20 Minn. 139, reaffirm this doctrine.

In *Keller v. Ybarru*, 3 Cal. 147, plaintiff counted upon an agreement by the defendant, whereby he undertook to sell and deliver to the plaintiff so many of the grapes then growing in his vineyard as the plaintiff should wish to take, for which the plaintiff agreed to pay the defendant ten cents per pound on delivery. The plaintiff averred that he subsequently notified the defendant that he wished to take nineteen hundred pounds of grapes, and tendered the one hundred and ninety dollars in payment therefor, and requested the defendant to deliver such grapes to the plaintiff, but defendant refused to deliver the same, or any part thereof. The court held that this agreement, when first entered into, amounted to an offer upon the part of defendant, which the plaintiff had a right to accept or reject, and the defendant to retract at any time before acceptance; but that, when the plaintiff named the quantity of grapes which he desired to take under the offer of the defendant, the contract was complete, and both parties were bound by it. Substantially the same doctrine was held in *Smith v. Morse*, 20 La. Ann. 220.

In *Boston etc. R. R. Co. v. Bartlett*, 3 Cush. 224, it was held that a proposition in writing to sell land at a certain price, if taken within thirty days, is a continuing offer, which may be retracted at any time; but if, not being retracted, it is accepted within the time, such offer and acceptance constitute a valid contract.

So it is generally held that in suits upon unilateral contracts, if the defendant has had the benefit of the consideration for which he bargained, he can be held bound: *Jones v. Robinson*, 17 L. J. Ex. 36; *Mills v. Blackall*, 11 Q. B. 858; *Morton v. Burn*, 7 Ad. & E. 19; *Kennaway v. Treleavan*, 5 Mees. & W. 498; *Richardson v. Hardwick*, 106 U. S. 255.

If it be held, as we think the correct doctrine is, that an offer to furnish such goods as the plaintiff may want within a stated time may, upon acceptance by the offeree before withdrawal, constitute a valid contract, it is difficult to see why, if the offeree orders any portion of the goods, and the offerer has the benefit of the sale, the entire contract may not become valid and binding. This certainly would constitute a sufficient consideration. If, in the present case, the defendant had, in consideration of the present sale and delivery to the plaintiffs of one lot of wheels at a stated price, and for

which the defendant received its pay, further agreed to furnish such further quantity of wheels as the plaintiffs might desire during the season, it would seem that the purchase of the one lot, as offered, would afford a sufficient consideration for defendant's undertaking. This view is adopted in England.

In Bishop on Contracts (sec. 78), it is said: "Where it is admitted that there is nothing for A's promise to rest on but B's promise, if B has not promised, A's promise rests on nothing, and is void. There may be cases in seeming contradiction to this; if there are any really so, they are not to be followed. In one case, parties agreed that one of them should supply the other during a designated period with certain stores, as the latter might order. He made an order, which was filled, then made another, which was declined; and, on suit brought, the defendant rested his case on the lack of mutuality in the contract, which, he contended, rendered it void. Plainly, it stood, in law, as a mere continuing offer by the defendant; but, when the plaintiff made an order, he thereby accepted the offer to the extent of the order, and it was too late for the other to recede. So judgment went for the plaintiff."

See *Railway Co. v. Witham*, L. R. 9 Com. P. 16. We think the doctrine of this case is sound, and that it should control the present case. Judgment should be reversed, with costs, and defendant given leave to plead over.

SALES — CONTINUING OFFER TO SELL. — The option of one party not to be bound by a contract involves a like option in favor of the other. So where one takes a horse with the privilege of purchasing it within a certain time if it proves satisfactory, the owner may relieve himself from the contract by giving notice of his withdrawal before the expiration of the time designated and before the other party has elected to purchase: *Eskridge v. Glover*, 5 Stew. & P. 264; 26 Am. Dec. 344, and note with cases collected. See *Mactier v. Frith*, 6 Wend. 103; 21 Am. Dec. 262, and note. On the rights and obligations of the parties to contracts of sale made by letter, see *MacLay v. Harvey*, 90 Ill. 525; 32 Am. Rep. 35, and extended note; *Bowen v. McCarthy*, 85 Mich. 26.

ESTATE OF STEBBINS.

[94 MICHIGAN, 304.]

WILLS — RIGHTS OF PRETERMITTED HEIR. — When an heir at law has been omitted from the will of his ancestor, the question whether or not the omission to provide for such heir was intentional, or unintentional, and due to accident or mistake, is one of fact, which the pretermitted heir has a right to have submitted to a jury, and a verdict in his favor is conclusive if the testimony offered has any legal tendency to support the conclusion reached.

WILL — CONSTRUCTION — PRETERMITTED HEIR. — When a testator by one clause in his will bequeaths the family Bible to his son if the latter desires it, and if not, it may then be placed in the hands of the testator's granddaughter, naming her, and by another clause he bequeaths his books and clothing to be divided among his brothers and their families, but giving such granddaughter the privilege of first selecting from them, if she so desires, the will cannot be said, as matter of law, to make any provision for such granddaughter so as to conclude her from claiming that the testator unintentionally or by mistake or accident omitted to provide for her in his will.

WILLS — PRETERMITTED HEIR — PROOF OF OMISSION. — Omission to provide for an heir in a will may be shown to be unintentional either by the terms of the will or by extrinsic parol evidence, and the relation of the testator to the objects of his bounty and to the omitted heir, as well as to his intelligence, his mental and physical condition, and the circumstances connected with the making of the will, are all proper matters for the consideration of the jury.

Hoyt Post, F. H. Canfield, C. I. Walker, and Walker and Walker, for the appellants.

B. M. Thompson, for the respondent.

DURAND, J. This case was brought into this court by *certiorari*, but, as the whole record was brought up, together with the exceptions taken at the trial, it was argued by counsel and heard as if brought here by writ of error.

Emily D. R. Stebbins, who is a granddaughter and one of the two sole heirs at law of Nehemiah D. Stebbins, who died testate, petitioned the probate court of Wayne County, asking for an order assigning to her one half of his estate, on the ground that he had omitted to provide for her in his will, and that such omission was unintentional and accidental. Her claim is based upon section 5810, Howell's Annotated Statutes, which provides that: "When any testator shall omit to provide in his will for any of his children, or for the issue of any deceased child, and it shall appear that such omission was not intentional, but was made by mistake or accident, such child, or the issue of such child, shall have the same share in the estate of the testator as if he had died intestate."

The probate judge denied the petition, and upon an appeal being taken to the circuit court for the county of Wayne, the question of fact was tried by a jury, who found that the omission to provide for the petitioner was unintentional and accidental. Thereupon the circuit judge caused a judgment to be entered that the petitioner was entitled to the same share in the estate of the testator as if he had died intestate. The circuit judge refused to decide whether he would consider the verdict of the jury as conclusive on the facts or advisory merely, but submitted to them these two questions of fact: "1. Was the omission to provide in the will in question for Emily D. R. Stebbins intentional? 2. Was the omission to provide in the will in question for Emily D. R. Stebbins due either to accident or mistake?"

The jury answered the first question in the negative and the second question in the affirmative.

The learned counsel for the estate insist that it was error for the circuit judge to submit these questions of fact to the jury, and that it was not such a case as should have been tried before a jury, but that it appeals rather to the equitable jurisdiction of the court, and should therefore be decided by the court without the intervention of a jury. We cannot agree with this contention. The question was purely one of fact. It had no reference to the proper or improper exercise of any discretionary power vested in anyone, or to any accounting by anyone or considerations as to the propriety of any charges or investments, or as to the allowance of compensation, or any other matter which appeals to equitable principles, or to the equitable consideration of the court, under the rule laid down in *Gott v. Culp*, 45 Mich. 275. No such question arose in this case, nor anything approaching it, and the question of whether or not the testator omitted to provide in his will for his granddaughter unintentionally or by accident or mistake is as clearly a simple question of fact as is that of whether or not the testator was of sound and disposing mind when he executed the will, or whether he signed it at all, or whether or not he had been unduly influenced to sign it, or whether or not the attesting witnesses had signed it in the presence of the testator and of each other.

Section 6783, Howell's Annotated Statutes, provides that upon an appeal from the probate court the circuit court "Shall proceed to the trial and determination of the question according to the rules of law; and if there shall be any question of fact

to be decided, issue may be joined thereon under the direction of the court, and a trial thereof had by jury."

The fullest latitude has been given to this statute in this state both by the profession and the courts, and the absolute right of a party to have all questions of fact in this class of cases tried by a jury was settled by this court in *Grovier v. Hall*, 23 Mich. 7. This rule has never been seriously questioned in any of the numerous cases which have been in this court for review, and we may well consider this right to be fully settled in this state.

The testator in one clause of his will, after giving to his son, Theodore W. Stebbins, the sum of five hundred dollars, also gave him the large family Bible, if he desired it, and if not, then this clause states that it may be put into the hands of the granddaughter, Emily D. R. Stebbins. By another clause he gave his books and clothing to be divided among his brothers and their families, but gave the granddaughter referred to the privilege of selecting from them if it was her wish. It is insisted, because the testator thus mentioned the granddaughter in his will, that he did provide for her, within the meaning of the statute referred to, and that she is thereby, and as a matter of law, precluded from claiming to the contrary. We do not think so. There is nothing in the language of either of the clauses in which her name is written, nor in the character of the gifts thus conditionally bestowed, and which at most are to be treated as mere mementos, which, as a matter of law, in any way concludes her from claiming that the testator unintentionally or by mistake or accident omitted to provide for her. While it would undoubtedly be true that she would be concluded by the terms of the will itself if the testator had made some provision for her of a substantial character, however insignificant it might be in amount, but which showed that he intended it as a provision, and not as a keepsake merely, yet we cannot hold as a matter of law that these trifling articles, whose only real value to the petitioner is based upon the fact that they are personal relics of the testator, and which were evidently so considered by him, if he gave any thought to it at all, are such a provision as is meant by the statute under which the petitioner in this case claims. On the contrary, it is a question to go to the jury with the other facts in the case, and from which they might determine, if they chose, that the testator having remembered her even as he did, it was not his

intention to do more for her, and that his failure to provide further for her was intentional.

It is also contended that the evidence in the case did not warrant the jury in finding that the omission to provide for the petitioner was accidental or unintentional. Upon this point we are limited in our authority. The only question we can consider is whether there was any evidence at all submitted to the jury from which they could find as they did, and not whether that evidence is sufficient in amount or character to satisfy us. The jury were the sole judges of the weight to be given the testimony, and they alone were entitled to decide upon whether a preponderance of the proof was with the petitioner.

There was testimony in the case in reference to the circumstances attending the making of the will; the relationship and condition of the parties; the affection existing between them; the extent and frequency of their visits and correspondence; the age of the testator; his mental and physical condition, as evidenced not only by the will itself and by the peculiarity of some of its provisions, but also by his feeble condition about the time the will was made, and his death shortly afterwards. This class of testimony was all competent for the jury to consider, and from it they had a right to determine the questions submitted to them by the court. The relation of the testator to the objects of his bounty and to this granddaughter, as well as his intelligence, his mental and physical condition, and the circumstances connected with the making of the will, are all proper matters for consideration by the jury: *Buckley v. Gerard*, 123 Mass. 8; *Converse v. Wales*, 4 Allen, 512; *Ramsdill v. Wentworth*, 101 Mass. 125; *Peters v. Siders*, 126 Mass. 135; 30 Am. Rep. 671; *Prentiss v. Bates*, 93 Mich. 234, and cases cited. And the omission to provide may be shown to be unintentional either by the terms of the will or by extrinsic parol evidence: *Wilson v. Fosket*, 6 Met. 400; 39 Am. Dec. 736.

The jury, therefore, having some evidence upon which to base their verdict, we have no right to disturb it, for we must hold in this case, and do hold, that the verdict of the jury was not advisory merely, but conclusive upon the facts submitted to and decided by them.

It follows that the judgment must be affirmed, with costs.

LONG and GRANT, JJ., concurred with DURAND, J.

MR. JUSTICE MONTGOMERY and CHIEF JUSTICE McGRATH, while concurring in the majority opinion that it is competent to try the question involved in this case by a jury, and that the verdict is conclusive if the testimony offered has any legal tendency to support the conclusion reached, dissent on the ground that there is not a scintilla of evidence to sustain the conclusion that the petitioner was omitted from the will in question unintentionally or by mistake or accident. Although it may be conceded that a bequest of keepsakes to an heir does not amount to a provision for him yet the mere failure to make such provision does not create a presumption that the testator omitted to make such provision by accident or mistake. Before a pretermitted heir can claim under a will he must show both an omission to provide for him and that such omission was by mistake. In cases dealing with the rights of an heir born after the making of the will it may well be presumed that the father should make some provision for such heir, and that the omission to make provision was not intentional, and this presumption arises not from the conditions existing at the time the will was executed, but from a change in conditions occurring thereafter. But such presumption does not arise in the present case nor can it be made to appear that the omission to provide for the heir was accidental by merely showing that the deceased was friendly with him; that they kept up a correspondence and that the testator was an old man, though mentally competent to make a will. "If this is enough, then it becomes at once the province of juries to administer estates according to their own sense of right. This statute was not intended to abridge the rights of a man to do what he will with his own. On the contrary where it is established by the probate of a will, as in this case, that the testator is competent and has in fact executed the will, the legal presumption is that the instrument expresses his wishes. This presumption can be overcome, not by showing what, according to some people's sense of right, would have been a proper disposition of the property, but by showing facts and circumstances which lead to a conclusion that the testator had other views or other purposes than those expressed, or did not have the purposes expressed in the will, but that by accident or mistake the provision for the child was omitted. This could, of course, be made to appear by declarations of the testator evidencing a purpose to provide for the omitted child, or by declarations made after the will, showing that he supposed he had provided for such child; and perhaps in other ways. But it cannot be done by simply showing a state of facts which would show it to have been eminently proper to provide for such child, without fixing a limitation upon the power of disposal of one's property by will which the statute gives no color for."

WILLS — RIGHTS OF PRETERMITTED HEIR. — A child living at the time of the death of the testator, and not named or provided for in his will, takes against and notwithstanding the will: *Worley v. Taylor*, 21 Or. 589; 28 Am. St. Rep. 771, and note; and such an heir cannot be disinherited except by the testator leaving his property to another: *Coffman v. Coffman*, 85 Va. 459; 17 Am. St. Rep. 69, and note. The failure of a testator to provide for one of his children in his will, will not prevent its being admitted to probate, though it does not appear that the omission was intentional: *Doane v. Lake*, 32 Me. 268; 52 Am. Dec. 654. A court cannot open the will of a testator to admit a child unless the evidence clearly shows that his omission therefrom was not intentional: *Moon v. Estate of Evans*, 69 Wis. 667. See extended note to *Wilson v. Fosket*, 39 Am. Dec. 740.

WILLS — PRETERMITTED HEIR — PROOF OF INTENT. — An heir at law can only be disinherited by express devise or by necessary implication, and such

implication must amount to such a strong probability that an intention to the contrary cannot be supposed: *Estate of Jacobs*, 140 Pa. St. 268; 23 Am. St. Rep. 230, and note. The declarations of a testator at the time of executing his will, are in some states admissible to show that the omission of certain children from mention therein, was intentional and not the result of accident or mistake: *Lorieux v. Keller*, 5 Iowa, 196; 68 Am. Dec. 696, and note; *Wilson v. Fosket*, 6 Met. 400; 39 Am. Dec. 736. Generally, however, such evidence is not admitted, and the intent to disinherit a child must appear from the words of the will: *Estate of Stevens*, 83 Cal. 322; 17 Am. St. Rep. 252. See *Terry v. Foster*, 1 Mass. 145; 2 Am. Dec. 6; note to *Wilson v. Fosket*, 39 Am. Dec. 743, 744.

AUSTRIAN AND COMPANY v. SPRINGER.

[94 MICHIGAN, 342.]

PRINCIPAL AND AGENT — ORDER FOR GOODS, WHEN BINDING ON PRINCIPAL.

When a general agent procures an order for goods to be shipped by his principal, and such order describes the goods and states the prices and date of shipment, and is signed by the party ordering, to whom the agent gives a receipt for the order containing the same statement, a valid contract of sale is created, which is binding on the principal.

PRINCIPAL AND AGENT — PRESUMPTIONS AS TO AUTHORITY OF AGENT. —

Parties dealing with an agent have a right to presume that his agency is general, and not limited, and also to presume that one known to be an agent is acting within the scope of his authority.

PRINCIPAL AND AGENT — EVIDENCE OF AGENCY. —

Evidence of parties who have dealt with a principal through his agent is competent to show the character of the agency.

PRINCIPAL AND AGENT — EXTENT OF AUTHORITY OF AGENT. —

The principal is bound, as to third persons dealing with his agent and acting in ignorance of any limitations on his authority, by his apparent, and not by his express, authority. The authority of the agent depends, so far as it involves the rights of innocent third persons relying thereon, upon the character bestowed, rather than upon the instructions given.

PRINCIPAL AND AGENT — AUTHORITY OF AGENT. —

Whatever attributes properly belong to the character bestowed upon an agent will be presumed to exist, and they cannot be cut off by private instructions of which those who deal with the agent are ignorant. Among these attributes is the power to do all that is usual and necessary to accomplish the object for which the agency is created.

PRINCIPAL AND AGENT — AUTHORITY OF SOLICITING AGENT. —

Agents sent out by manufacturers to solicit orders, are held out to the trade as having authority to act according to general usage, practice, and course of business conducted by such manufacturers through such agents; and the question of what is usual or necessary to be done by such agents is ordinarily for the jury.

CUSTOM — EVIDENCE TO REBUT. —

When a general custom is so well settled and notorious as to raise the presumption that it was known to the buyer and seller, it cannot be rebutted by the seller's testimony that he was ignorant of its existence.

DAMAGES FOR BREACH OF CONTRACT. — The measure of damages for breach of a contract to sell and deliver personal property when the purchase price has not been paid, is the difference between the contract price and the market price at the time and place of the promised delivery.

EVIDENCE. — Questions calling for the name of an association to which a witness has referred by letter, does not necessarily call for the contents of a written instrument, and are permissible.

John T. Miller, and Taggart, Wolcott, and Ganson, for the appellant.

Stuart and Knappen, for the respondent.

MCGRATH, C. J. Plaintiff is engaged in manufacturing furniture at Chicago, Illinois, and defendant is a manufacturer of looking-glass plates, at Fuerth, Bavaria. On the 21st of March, 1890, one Frank O. Fitton called at plaintiff's office; gave to plaintiff's manager a card as agent of defendant; "said he came to sell me German looking-glass plates for importation; that he was selling for defendant, and quoted prices"; and after some negotiations plaintiff signed a written order drawn up by Fitton, which is as follows:—

[LETTER HEADING OF LEO AUSTRIAN & Co.]

"CHICAGO, March 21, 1890.

"NATHAN SPRINGER, Fuerth, Bavaria.

"*Dear Sir,*—Please enter our order for following German looking-glass plates; same to be shipped as soon as possible, not later than May 15, and f. o. b. Chicago; freight to be prepaid to New York, and duty and freight from New York to be paid by consignee, and deducted from invoice. [List given.] Terms and discount: 60—10—2½ on plain; 60—10—5—2½ on beveled. The size 10½ by 17, beveled, being quoted at net 87½ cents, f. o. b. Chicago. Net 60 and 90 days.

"LEO AUSTRIAN & Co."

Fitton drew up, signed, and delivered to plaintiff the following:—

[LETTER HEAD OF LEO AUSTRIAN & Co.]

"CHICAGO, March 21, 1890.

"Ordered from Nathan Springer, Fuerth, Bavaria, following German mirrors, to be shipped soon as possible, not later than May 15. Terms: f. o. b. Chicago. Net 60 and 90 days. [List of glass, prices, terms, and discounts same as in order signed by plaintiff.]

FRANK O. FITTON, Agent."

Fitton said he would accept the order. The discounts were from list prices. Plaintiff had a price list, on which Fitton gave the discounts. The defendant did not deliver the goods.

About May 1, 1890, plaintiff received from defendant the following letter:—

“[LETTER HEAD OF N. SPRINGER.]

“FUERTH, BAVARIA, April 15, 1890.

“MESS. LEO AUSTRIAN & Co., Chicago, Ill.

“*Gentlemen*,—Your valued order March 21 duly to hand, and regret not to be able to execute it in the time specified. Hoping to hear from you later, I remain,

“Truly yours,

“N. SPRINGER.”

Leo Austrian says: “Upon receipt of that letter I wrote to defendant. I suppose my letter was sent out of the office as all the mail is. The letter copy book was accidentally destroyed. Up to the first day of July I expected that the order would be filled. On June 28, 1890, I placed an order in New York. They would give me no price at the time, but the order was placed subject to July prices.”

This suit is brought to recover the difference between the prices named in the order given to Fitton and the prices paid. Plaintiff recovered, and defendant appeals.

The first question raised is that the evidence fails to show a contract between the parties: 1. The order signed by plaintiff and the paper signed by Fitton do not constitute a contract; 2. It does not appear in evidence that Fitton had authority to make a binding contract.

These two propositions practically resolve themselves into one; for if Fitton had authority to bind defendant, the procurement and receipt of the order was sufficient, in itself, to create a contract: *Kessler v. Smith*, 42 Minn. 494. In that case the order was solicited at St. Paul, Minnesota, by one of the firm, and was addressed to the firm at New York. In *Heffron v. Armsby*, 61 Mich. 505, a memorandum of sale was signed by the soliciting agent only, and delivered to the purchaser. It was held that if the agent was authorized to act for the vendor, the memorandum was sufficient to satisfy the statute of frauds.

In addition to the receipt of the order by the agent in the present case, the agent executed an acknowledgment, “Ordered from Nathan Springer,” etc., and signed it, “Frank O. Fitton, Agent.” This cannot be treated as a mere receipt for an order, nor is it an acknowledgment of a request to enter an order, but rather an acknowledgment of the entry of the order, signed by Fitton as agent for his principal.

As to the authority of the agent, there is no evidence of any limitation upon his powers. It appears that he was the agent of defendant. He was in defendant's employ, and sent out for the express purpose of taking orders for glass. He was a resident of the United States, and was employed by letter. He held himself out as an agent, and that to defendant's knowledge. In his correspondence with his principal, he wrote upon a letter head in which his name appeared as "manufacturer's agent." The only question that can be raised under this record is as to the extent of his authority. Parties dealing with an agent have a right to presume that his agency is general, and not limited: *Methuen v. Hays*, 88 Me. 169; *Trainer v. Morison*, 78 Me. 160; 57 Am. Rep. 790; and the presumption is that one known to be an agent is acting within the scope of his authority: *Inglish v. Ayer*, 79 Mich. 516. Plaintiff went further. Evidence of persons who had dealt with defendant through this agent was introduced to show the character of his agency. This was competent: *Heffron v. Armsby*, 61 Mich. 505; *Haughton v. Maurer*, 55 Mich. 323; *Gallinger v. Lake Shore Traffic Co.*, 67 Wis. 529. One Sielkin testified that he had known defendant since January, 1889; that for three years the firm of which he was a member had been buying glass from defendant, a part of that time through Fitton; that orders had been given by his firm, through Fitton, in September, 1889, and February, 1890. In December, 1889, witness received an invoice from defendant of the September order, on the heading of which was printed the words: "Agents are not authorized to collect or receive money on my account." The witness says further: "Mr. Fitton solicited, in person, the order which I handed to him personally, and the order mailed to him was solicited by him in person. During the same time we purchased goods direct from the defendant, Springer. The defendant mailed us two price lists, and Mr. Fitton has at divers times made quotations verbally to us. I have other bills showing sales from Springer to H. Lieber & Co., either verbally or through correspondence, but am unable to fix any dates as to when such orders were given."

One Pugh testified that he had acted as agent for defendant, Nathan Springer; that on the fifteenth day of May, 1890, he became the partner of Warren C. Dewey, who was at that time the agent at Grand Rapids for the defendant for the sale of his products; that the agency ended on the 1st of July

1890, by reason of Nathan Springer's entering into a pool, in consequence of which he could not sell to parties outside of the combination.

"We were authorized to take orders for the defendant for German looking-glass plates. We were in the habit of accepting orders without submitting them to the defendant, except in cases where a new account was opened, when the name was referred by us to the financial agent at New York of the defendant, for the purpose of ascertaining the financial standing of such new customer, in such cases where the standing of such new customer was doubtful. The defendant knew of this habit, and filled orders that were sent to him. We were apprised of the prices at which we were authorized to make sales either by cablegram or by letter. I do not know Frank O. Fitton. I do not know whether he was an agent of the defendant, but I know he was reputed to be, and was generally acknowledged to be such an agent among the trade."

It is well settled that the authority of the agent must depend, so far as it involves the rights of innocent third persons who have relied thereon, upon the character bestowed rather than the instructions given. In other words, the principal is bound to third persons, acting in ignorance of any limitations, by the apparent authority given, and not by the express authority: *Mechem on Agency*, sec. 283. The question is not, what was the authority actually given? but, what was the plaintiff, in dealing with the agent, justified in believing the authority to be?: 1 *American Leading Cases*, 567, 568; *Griggs v. Selden*, 58 Vt. 561; *Home Life Ins. Co. v. Pierce*, 75 Ill. 426; *St. Louis etc. Packet Co. v. Parker*, 59 Ill. 23; *Inglish v. Ayer*, 79 Mich. 516. Whatever attributes properly belong to the character bestowed will be presumed to exist, and they cannot be cut off by private instructions of which those who deal with the agent are ignorant. Among those attributes is the power to do all that is usual and necessary to accomplish the object for which the agency was created: *Mechem on Agency*, sec. 347; *Banner Tobacco Co. v. Jenison*, 48 Mich. 459, 462. Parties sent out by manufacturers to solicit orders are held out to the trade as having authority to act according to the general usage, practice, and course of business conducted by such manufacturers through such agents; and the question of what is usual or necessary to be done by such agents is ordinarily for the jury. In the present case the principal was removed thousands of miles from the customer, at a point

where, in the ordinary course of mail, it would take from four to six weeks to exchange letters. We find no error in the instructions given upon the point discussed.

The second and third assignments of error relate to the admission of testimony tending to show a custom in selling glass to furniture manufacturers: 1. As to the means of making such sales; and 2. As to the acceptance of orders by agents making the sales. The evidence was objected to unless coupled with a proposal to bring home to the defendant knowledge of such custom. One of the witnesses had resided in Grand Rapids; was then a resident of Chicago; had, while at Grand Rapids, acted as agent for defendant; and, while such agent, had habitually accepted orders without conference with defendant and to his knowledge. Another witness was a resident of Chicago, but had been connected with a firm of manufacturers and importers of looking-glass, having their place of business in New York and their factories at Fuerth, Bavaria. Another was a salesman, engaged in Illinois and Wisconsin selling mirrors as agent for foreign manufacturers. Another witness was a member, at Indianapolis, of a firm dealing in mirror glass, and had been connected with the firm for twenty-two years. For three years the firm had been buying mirror plates from defendant, and several orders had been given through Fitton as agent for defendant. This evidence tended to show that the custom was not a purely local one, but one that prevailed generally. The rule is, that the custom must be one so well settled and notorious as to raise the presumption that it was known to buyer and seller: *Mechem on Agency*, sec. 348. This presumption was not, therefore, rebutted by defendant's testimony that he was not aware of such custom, although it might have been, had the custom been shown to have been a purely local one. This was shown to be a general custom pertaining to the glass trade in this country, and not confined to any particular locality, as was the case in *Pennell v. Delta etc. Co.*, 94 Mich. 247.

Upon the question of damages, it is insisted that immediately after the receipt of defendant's letter, or in the early part of May, the advance in the price of glass was but light, and that plaintiff should have at that time supplied itself, but instead of so doing, it waited until the latter part of June, at which time the advance was much greater. The general rule is that the measure of damages for a breach of contract to

sell and deliver personal property, when the purchase price has not been paid, is the difference between the contract price and the market price at the time and place of the promised delivery: *Haskell v. Hunter*, 23 Mich. 305; 2 Sutherland on Damages, 365. The goods were to be delivered at Chicago, and were to be shipped not later than May 15. In the ordinary course it would take from thirty days to two months for them to arrive at Chicago. The times of payment fixed by the contract were net sixty and ninety days after delivery at Chicago. Leo Austrian testified that he placed a number of orders during the month of June, but that the parties refused to ship the goods. There was abundant testimony tending to show that dealers declined and evaded contracts or shipments during that month, in expectation of an advance in prices. He says: "I tried to make larger purchases in June. I tried to buy of Mr. Hart and Mr. Gloeckler, and I went myself to New York, personally, to buy. I could not get glass. They gave me prices all right, but, when I inquired for such sizes as I needed in my business, they uniformly said: 'We have not got them now. Wait a few weeks, and we will give them to you.'"

Referring to certain New York houses, he says, further: "I believe those were the only four houses in New York that I had any dealings with, and I tried to buy glass of them at that time. I made an effort to buy glass, and they uniformly told me that they had none for sale just now; to wait a few days, and I could have all the glass I wanted."

He placed an order on June 28, but it was taken subject to the July advance. One of defendant's witnesses testifies that he gave an order to defendant in the latter part of May, and it was declined.

It was held in *Goodrich v. Hubbard*, 51 Mich. 62, 70, that, the plaintiff not having elected to consider the contract broken before the arrival of the time for its full performance, he was entitled to the difference in value as of that time: See, also, *Schmertz v. Dwyer*, 53 Pa. St. 335; *Kribs v. Jones*, 44 Md. 398. The court instructed the jury that plaintiff was entitled to wait a seasonable time for the goods to reach Chicago, after the final date of shipment, and in this we think there was no error. It is very evident from this record that there was, in fact, no market price for mirror glass during any time in the month of June, and under the testimony the goods could not have reached plaintiff before some time in that month.

The testimony of defendant's manager was taken by deposition. He testified that he wrote the letter to plaintiff dated April 15, 1890, and that the defendant did not have the manufacturing capacity to fill the order at that time, and undertook to give additional reasons why the order had not been filled, viz., that the order included a size not contained in the list, and that he was unwilling to give plaintiff credit to the amount of the order. On cross-examination the witness testified that they had refused to ship an order given by the Kent Furniture Company of Grand Rapids, dated May 24, 1890, taken by one Dewey; that on the 20th of May, 1890, they cabled Dewey to take no more orders; that he had a brother to whom he wrote, asking him to effect a settlement by which the moneys owing from the Grand Rapids Furniture Company to the defendant, held back by reason of damages claimed for failure to fill orders, might be paid over; that the contract with the association is dated June 30, 1890, — therefore, it could have nothing to do with the rejection of these orders.

"Q. What is the name of that association referred to in that letter?

"A. I may have referred in my letter to a contract which Mr. Springer had subsequently made, on the 30th of June, 1890, with the German Looking-Glass Company, of New York.

"Q. For what period of years did the contract referred to in that letter run?

"A. From its date, the 30th of June, 1890, to the 31st of December, 1892.

"Q. In that letter, did you not state, in substance, to your brother, that you were satisfied the defendant had made a mistake in going into that contract with the association referred to, and that you and defendant desired now to make such arrangements with the Grand Rapids furniture trade as to be able to regain their patronage when the term of years for which defendant was under contract not to sell to American houses should expire?

"A. Yes, I may have said something of that kind. I keep no copy of my private letters."

These questions were objected to, but the objections were overruled, and we think properly. This was cross-examination, and the testimony tended to show reasons for the failure to fill the order other than those given. The jury were instructed that the testimony was admitted for that purpose only.

A witness who had written a letter in which he had referred to an "association" was asked to name the association referred to. The question did not necessarily call for the contents of a written instrument.

The testimony called for in the question put to the witness Creque, and excluded, was substantially given by the witness.

Evidence admitted without objection tended to prove the assertions made by counsel for plaintiff in his opening. The rules laid down dispose of the other questions raised.

The judgment is affirmed.

AGENCY. — PRESUMPTIONS AS TO AGENT'S AUTHORITY: See extended note to *Huntley v. Mathias*, 47 Am. Rep. 518, and note to *Kane v. Barstow*, 16 Am. St. Rep. 493, 494.

AGENCY — AGENTS ACTS, HOW FAR BINDING. — As to third persons the principal is bound by the acts or representations of his agent, done within the scope of his apparent authority: *Wachter v. Phoenix Ass. Co.*, 132 Pa. St. 428; 19 Am. St. Rep. 600, and note; *De Souchet v. Dutcher*, 113 Ind. 249; *Kane v. Barstow*, 42 Kan. 465; 16 Am. St. Rep. 490, and note. Where the fact of an agency is established, the power which an agent actually exercises in his principal's business may be looked to as evidence of the actual power possessed by the agent: *International etc. R'y Co. v. Prince*, 77 Tex. 560; 19 Am. St. Rep. 795.

CUSTOM — EVIDENCE. — When a custom is general, every person who makes a contract is presumed to know the custom, and it is binding upon him: *Horan v. Strachan*, 86 Ga. 408; 22 Am. St. Rep. 471, and note; *Barry v. Hannibal etc. R'y Co.*, 98 Mo. 62; 14 Am. St. Rep. 610; *Southwestern etc. Freight Co. v. Stanard*, 44 Mo. 71; 100 Am. Dec. 259; and note to *Ripley v. Aetna Ins. Co.*, 86 Am. Dec. 371.

SALES — BREACH OF CONTRACT — MEASURE OF DAMAGES, upon the breach of a contract for the sale of goods, when similar goods may be purchased in the market, is the difference between the market price at the place of delivery, and the contract price agreed to be paid: *Trigg v. Clay*, 88 Va. 330; 29 Am. St. Rep. 723, and extended note.

RENZ v. STOLL.

[94 MICHIGAN, 377.]

TRUSTS—DECLARATIONS OF TO SATISFY STATUTE OF FRAUDS.— While a declaration of trust need not be contained in the conveyance to the trustee, and any form of instrument, whether a letter addressed to a third person, or the answer of an alleged trustee in a chancery proceeding, will be sufficient to answer the requirements of the statute of frauds when there is no prescribed form of words in which the declaration must be made in order to make it valid, yet it must contain the substantial terms of the trust, or at least sufficient to identify the subject-matter by writing.

M. B. Breitenbach, William B. Jackson, and B. T. Prentis,
for the appellant.

John G. Hawley, for the respondents.

MONTGOMERY, J. The complainant filed a bill in the Wayne circuit, in chancery, to have certain lands in the city of Detroit decreed to have been held in trust by Baumeister for her, and to enforce the trust. Since the filing of the bill Baumeister has died, and the case proceeds against his administrator and codefendant, who was Baumeister's grantee.

The history of the legal title is as follows: On September 1, 1873, Henry Renz deeded the land to his wife, Emma Renz, the complainant. On August 10, 1874, complainant deeded the same to John Winterhalter. January 11, 1875, John Winterhalter deeded the land to John Baumeister, subject to all mortgages. There were at that time three mortgages on the land,—one to William Krenning, for two thousand five hundred dollars; one to the Detroit Building and Savings Association, for one thousand dollars; and one to Henry Wineman, for one thousand five hundred dollars, upon which it would appear, however, that there was but four hundred and eighty dollars due, at the time of the transfer to Baumeister. The consideration named in the deed from complainant to Winterhalter was six thousand dollars, and the value of the property at this time is not otherwise shown. The answer denies that the conveyance was made to Baumeister charged with any trust.

The complainant seeks to establish the trust by parol testimony. Rosa Haag, a daughter of complainant, testifies:

"Mother had a conversation with Winterhalter in the forenoon. In the afternoon Mr. Baumeister came over to the house, and said, 'Well, Emma, I will take the papers, and do you the favor; and I will have a new deed made out, and deed it back to you, whenever you want it.' Mother said, when she handed him the papers: 'Here is everything in this envelope that belongs to the property; . . . now, you see that I get them all back like this.' And he said: 'I will; and I will have a new deed made out, and deed it back to you, whenever you want it.'"

The complainant also called Frederick Haag as a witness, who testified that in 1887 he had a conversation with Baumeister, in which Baumeister admitted to him, in substance, that he held the property in trust for complainant, and his

only claim against it was for moneys that he had paid out to discharge the mortgages and tax liens. This witness further testified that he subsequently wrote Mr. Baumeister, and received a letter in reply, which letter he was unable to produce, but stated the contents, in answer to the question, "What did he write?" as follows: "He wrote me that promise was all right, but he didn't know all the matters in the case. He says, 'I lost considerable by Renz,' and something to the effect that he got even with him now. That is it."

The circuit judge held that under this testimony the complainant was not entitled to the relief prayed, and dismissed the bill. Complainant appeals.

Howell's Annotated Statutes, sec. 6179, provides that, "No estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by some person thereunto by him lawfully authorized by writing."

Unless we ignore the express provisions of this statute, we are compelled to hold that the conclusion of the circuit judge was correct. It may be conceded, as contended by complainant, that the declaration of trust need not be contained in the conveyance to the trustee, and that any form of instrument, whether a letter addressed to a third person or the answer of the alleged trustee in a chancery proceeding (*Patton v. Chamberlain*, 44 Mich, 5), will be sufficient to answer the requirements of the statute, and that there is no prescribed form of words in which the declaration must be made, in order to make it valid: *Ellis v. Secor*, 31 Mich. 185; 18 Am. Rep. 178. But the declaration in writing must contain the substantial terms of the trust, or at least sufficient to identify the subject-matter by writing; otherwise, the provisions of the statute would be rendered nugatory. The rule is well stated in *Perry on Trusts*, c. 3, sec. 83: "The objects and nature of the trust must always appear from such writings with sufficient certainty, and also their connection with the subject-matter of the trust. Indeed, courts require demonstration on the latter point; and the trust will not be executed if the precise nature of it, and the particular persons who are to take as *cestuis que trust*, and the proportions in which they are to take, cannot

be ascertained. When all these particulars properly appear from writings signed by the party, the trust will be executed."

And again, in Browne on Statute of Frauds, c. 7, sec. 108, it is said: "The words used . . . must distinctly relate to the subject-matter, and must serve to show the court that there is a trust, and what that trust is." See also, *Gault v. Stormont*, 51 Mich. 638. The decree will be affirmed, with costs.

MCGRATH, C. J., DURAND and GRANT, JJ., concurred with MONTGOMERY, J.

LONG, J. dissenting. I think there was sufficient evidence of the declaration of the trust to bring the case out of the statute, and that defendants should account with the complainant for the value of the property, and the rents and profits.

TRUSTS — DECLARATIONS — STATUTE OF FRAUDS. — Where a person indebted to another writes to him recognizing the indebtedness, and tells him that he will keep the money until he deems him capable of taking care of it; that he shall have it certain; that he may consider it on interest, — this is sufficient for the creation of a valid trust which is not within the statute of frauds: *Hamer v. Sidway*, 124 N. Y. 538; 21 Am. St. Rep. 693, and note. See note to *Bork v. Martin*, 28 Am. St. Rep. 574. Trusts not sufficiently declared on the face of a will, or by a writing identified as a part of it, cannot be set up by extrinsic evidence to defeat the rights of the testator's heirs: *Heidenheimer v. Bauman*, 84 Tex. 174; 31 Am. St. Rep. 29. The statutes of uses and trusts are not complied with except by a declaration of trust signed by the holder of the legal title, and needing nothing outside of the papers to show the entire arrangement: *Yerkes v. Perrin*, 71 Mich. 567; and to constitute a writing a declaration of trust, it must be of such a nature that the party must be believed to have intended it as such: *Cowan v. Wheeler*, 25 Me. 267; 43 Am. Dec. 283, and note.

GUSTIN v. UNION SCHOOL DISTRICT OF BAY CITY.

[94 MICHIGAN, 502.]

VENDOR AND VENDEE — OPTIONS TO PURCHASE IN UNILATERAL CONTRACTS — EFFECT OF. — Options for the purchase of land upon unilateral contracts do not vest any interest in the vendee, and become binding only by acceptance or performance of their conditions before the offer is withdrawn.

VENDOR AND VENDEE — OPTION TO PURCHASE CONTAINED IN LEASE — CONSIDERATION. — Rent reserved in a lease is a sufficient consideration for an agreement by the landlord therein contained to convey the land to the tenant upon the expiration of the term and upon the payment of an agreed purchase price.

VENDOR AND VENDEE — OPTION TO PURCHASE CONTAINED IN LEASE — ASSIGNMENT AND SPECIFIC PERFORMANCE OF. — An agreement by a landlord contained in a lease to convey the leased land to the tenant upon the expiration of the term and the payment of an agreed purchase price gives the tenant a right to purchase which will pass to his administrator and to the assignee of the latter; and upon the payment of the purchase price by such assignee within the time limited, the contract of purchase becomes complete, and may be specifically enforced in equity.

T. A. E. and J. C. Weadock, for the appellants.

J. L. Stoddard, for the respondent.

HOOKEE, C. J. This is a bill for specific performance. The premises in question are two lots in Bay City. On January 16, 1886, the defendant school district, through its proper officers, executed and delivered to George W. Mann a lease of the premises for the term of five years. Among the provisions of the lease was the following, viz.: "Said first party agrees to execute to said second party or his assigns a deed, with full covenants of warranty, of said described land, at the expiration of this lease, upon the payment to it of the sum of two thousand five hundred dollars, provided said second party or his assigns shall ask for said deed, in writing, at any time during the three months immediately preceding the time of the expiration of this lease."

Both parties signed the lease. In February, 1886, this lease was assigned to R. P. Gustin & Co. by instrument in writing. The bill alleges that this assignment was to R. P. Gustin, and the briefs of both parties so state. It will therefore be assumed that the exhibit is incorrectly printed, or that the name "R. P. Gustin & Co." was but another name for "R. P. Gustin," which may be inferred from the proofs. Gustin took possession of the property, and made repairs to the amount of several hundred dollars, and used the building upon the premises for a store until his death, on February 25, 1889. His widow, Rachel S. Gustin, was appointed administratrix, and administered the estate, and a corporation was organized, composed of herself and others, which purchased the stock, and continued the business upon the premises under some arrangement made with her.

On the ninth day of January, 1891, her attorney appeared before the defendant board of education, and represented that she was unable to sell the contract or buy the land, and asked a further lease for two years to the corporation. The

negotiations resulted in an agreement to make the R. P. Gustin Company a new lease for two years, with the privilege of purchasing left out. Writings were to be drawn, and defendants caused this to be done; but they were never executed. Defendants claim that the right to purchase was at that time surrendered. We do not think that the proofs show this.

On January 14, 1891, Rachel S. Gustin, as administratrix, assigned the old lease and contract to the complainant, receiving therefor one dollar. On the fifteenth day of January, 1891, complainant deposited two thousand five hundred dollars with the city treasurer, and demanded in writing of the president and clerk of the board a deed of the premises. This was refused, and his money was tendered back to him.

The defendants contend that under this lease all right of enforcement descended to the heirs, and that Mrs. Gustin had no right to assign it, so far at least as the right to purchase is concerned; and that complainant, taking nothing by the void assignment, and being shown not to be an heir of deceased, has no right to a deed. Counsel cited, in support of this contention, *Hunt v. Thorn*, 2 Mich. 213; *House v. Dexter*, 9 Mich. 246; *Baxter v. Robinson*, 11 Mich. 520; *Jenkins v. Bacon*, 30 Mich. 154; *Compo v. Jackson Iron Co.*, 49 Mich. 39. On the other hand, complainant asserts that the lease and accompanying option amounted to no more than a chattel interest, and as such, went to the representative, and might be sold by her without an order from the probate court, like any other personal property, and that therefore the assignment to the complainant was valid.

The test to be applied is this: Did the intestate acquire under the writing that which equity will treat as an interest in the land, to the extent of considering the vendor a trustee, holding the title for the vendee? Many, if not most, of the adjudicated cases upon what are termed "options" for the purchase of land seem to have arisen upon unilateral contracts, which only become binding by acceptance or performance of their conditions before the offer is withdrawn; but this case is not such, for the rent was a sufficient consideration for the offer, which was therefore irrevocable. The unilateral contract does not vest any interest in the land in the vendee: *Richardson v. Hardwick*, 106 U. S. 252. Neither does the writing in this case. The consideration only makes a right out of what, in the other case, is a privilege merely. In both cases the interest attaches only when the condition is performed.

The deceased then had merely a right to acquire an interest, and at his death, nothing descended to his heirs. The lease, however, with the accompanying right to purchase, did pass to his representative, and, through her, to the complainant, whose assignment the defendants are in no situation to assail. By the payment, the contract became a completed purchase, and the complainant acquired an interest in the land.

The decree of the circuit court will be affirmed, with costs.

VENDOR AND PURCHASER — OPTION TO PURCHASE — An option given by an owner of land for a valuable consideration, whether adequate or not, agreeing to sell it to another at a fixed price, if accepted within a specified time is binding upon the owner and his successors in interest with knowledge thereof: *Ross v. Parks*, 93 Ala. 153; 30 Am. St. Rep. 47, and note with cases collected in which the specific performance of such contracts is further discussed. A unilateral contract in writing simply giving an option to purchase land within a specified time at a given price is binding only on him who signs it, and is binding upon him only for the time stipulated for the exercise of the option: *Coleman v. Applegarth*, 68 Mo. 21; 6 Am. St. Rep. 417. A contract for the sale of land must bind both parties or it can bind neither: *Atlee v. Bartholomew*, 69 Wis. 43; 5 Am. St. Rep. 103.

LEASES. — OPTIONS TO PURCHASE IN: See *Harding v. Gibbs*, 125 Ill. 85; 8 Am. St. Rep. 345; and *Kerr v. Day*, 14 Pa. St. 112; 53 Am. Dec. 526, and note where the validity and construction of such contracts is discussed.

HARRISON v. HARRISON.

[94 MICHIGAN, 559.]

MARRIAGE AND DIVORCE — PREGNANCY BEFORE MARRIAGE AS GROUND FOR ANNULING. — Pregnancy before marriage, concealed from the husband, who has not previous to the marriage sustained improper relations with his wife, is a fraud which is sufficient ground for annulling the marriage, if the discovery of the fact is followed by a cessation of cohabitation and abandonment.

MARRIAGE AND DIVORCE — PLEADING. — An answer in a divorce proceeding in the nature of a cross bill must be verified in order to authorize a decree for the defendant, but if it is not verified, it may be amended in the absence of collusion between the parties.

C. W. Giddings and N. Leonard, for the appellant.

L. B. Sawyer, for the respondent.

HOOKE, C. J. Complainant filed her bill for divorce on the grounds of desertion, cruelty, and failure to provide. Defendant answered, denying the allegations of the bill, and asking that the marriage be annulled for fraud. The court

below dismissed complainant's bill, making no mention of defendant's claim to relief.

A discussion of the facts relied upon by complainant would subserve no useful purpose. It is sufficient to say that we think the circuit court did right in dismissing her bill. We think, however, that defendant was entitled to relief.

The question raised by the record never having been decided in Michigan, a short statement of the facts upon which the decision is based may be advisable: The defendant, a young Russian, residing here, became engaged to complainant, then living in Russia, through correspondence induced by mutual acquaintances. On August 8, 1889, he first met her, in New York, and on the 11th of the same month they were married, cohabiting then for the first time. In February he went east on business, and while gone she was delivered of a child. The evidence is conflicting, but we are satisfied that this was a mature child, carried the ordinary period. The defendant returned about two weeks after the birth. Complainant succeeded in convincing the defendant that it was a premature birth, telling him that, "she had a miscarriage, and that the baby was undeveloped at birth; that she was glad he did not come home right away, when the baby was born, for he would not have liked it, it was so small; that it weighed about four pounds, and did not have any shape to its eyes, nose, or feet; and that it was wonderful how it got developed in two weeks' time."

They lived together in apparent harmony until August 14 following, when defendant again went to New York; and the next day she, complainant, left, after making an arrangement with defendant's brother, through whom she obtained some money. On defendant's return he first ascertained the truth about the child, and upon her return, some days later, he refused to live with her.

The proof convinces us that complainant was *enccinte* at the time of her marriage, and that she succeeded in making him believe that the child, born something over six months after the marriage, was premature and legitimate; and we see no evidence of condonation or of cohabitation after discovery of the truth.

Pregnancy before marriage, concealed from the husband, who has not, previous to marriage, sustained improper relations with the wife, is a fraud which is a sufficient ground for annulling the marriage, if the discovery of the fact is followed by

a cessation of cohabitation, and abandonment: *Baker v. Baker*, 13 Cal. 87; *Reynolds v. Reynolds*, 3 Allen, 605; *Morris v. Morris*, Wright. 630; *Ritter v. Ritter*, 5 Blackf. 81; *Carris v. Carris*, 24 N. J. Eq. 516. This rule seems to be recognized in the case of *Sissung v. Sissung*, 65 Mich. 180.

The answer lacks the verification required by the statute to be appended to bills for divorce. Answers in the nature of cross bills require this, and no decree can be granted without it. But it may be amended. The proof shows an absence of collusion, and we will therefore remand the case, with direction that such amendment be permitted, and that thereupon a decree be entered by the circuit court, in chancery, dismissing complainant's bill, and annulling the marriage, as prayed by defendant.

The complainant will recover costs of this court.

MARRIAGE AND DIVORCE—PREGNANCY OF WIFE BEFORE MARRIAGE AS A GROUND FOR ANNULING.—The fraudulent concealment by a woman of her pregnancy by another man will avoid her marriage to one ignorant of this fact and believing her chaste at the time of such marriage: *Sissung v. Sissung*, 65 Mich. 168; *contra*: see *Varney v. Varney*, 52 Wis. 120; 38 Am. Rep. 726; *Long v. Long*, 77 N. C. 304; 24 Am. Rep. 449, and note; while in *Allen's Appeal*, 99 Pa. St. 196, 44 Am. Rep. 101, it was held a question for the jury whether the concealment by a woman of her pregnancy was such a fraud as would avoid a subsequent marriage; and see note to the latter case.

BARRON v. DETROIT.

[94 MICHIGAN, 601.]

MUNICIPAL CORPORATIONS—LIABILITY FOR NEGLIGENT CONSTRUCTION OF MARKET HOUSE.—A city authorized but not required by charter to erect and maintain market houses, will be held to the same degree of care, not only in the construction, but also in the plan of construction of such market houses, as a private corporation or an individual, and it will also be held liable for negligence to the same extent as such corporation or individual.

John J. Speed, for the appellant.

Ira G. Humphrey, Orla B. Taylor, and Edwin F. Conely, for the respondent.

LONG, J. The facts in this case are not in dispute. It appears that in January, 1890, by resolution of the common council, the city engineer was instructed to prepare plans for the construction of a market building. The plans were pre-

pared and submitted, in response to the resolution, and the board of public works was directed to advertise for proposals for constructing the building in accordance therewith. Proposals were advertised for, and the board of public works reported that Patrick Dee was the lowest bidder; and by instruction of the common council the board entered into a contract for the construction of the building with him, which contract was confirmed by the council. The plans were prepared by a draughtsman in the office of, and under the supervision of, the city engineer.

The building was an open structure, built on iron columns about fifteen feet apart, surmounted by a roof composed of wood and iron. It was built in the form of a cross; being about three hundred feet one way, and four hundred feet the other. The columns rested upon stone piers, but were not anchored. At the time the plans were prepared, the propriety of anchoring the columns was discussed by the draughtsman and engineer. The draughtsman thought they ought to be anchored, but the engineer thought the construction strong enough, and his opinion was followed. He claims, however, to have looked the plans over hurriedly, and that he did not examine them carefully, for the reason that a competent superintendent was to be employed, and that the building would be properly constructed under him, and if any defect existed the omission would be supplied as the work progressed. The superintendent was appointed, and the work carried on under the contractor. Before it was completed some members of the board of public works expressed the opinion that the structure was dangerous, and would go down in a wind; and, on the advice of the city engineer, it was examined by architects, and, upon their recommendation, several braces were added, to strengthen it. One of the architects thus called says that he advised the inserting of some strips, and putting bolts through them, and anchoring them down; that it should be anchored in some way. These suggestions were referred by the board of public works to the contractor, and he placed extra braces in the roof, but did not anchor the columns. It was testified by some of the architects that in such buildings, in this part of the country, forty pounds to the square foot, wind pressure, is usually allowed; and it was further shown that the velocity of the wind, to exert forty pounds pressure, is ninety to one hundred miles an hour.

On December 23, 1890, in a wind blowing about fifty miles

an hour, this market building fell, no other buildings in the vicinity being affected; so that it is apparent that the fault was in the failure to anchor the columns. The plaintiff was injured by the falling of the building. It is conceded that at the time he was lawfully upon the premises, having paid the usual license fee required and collected by the city. His claim for damages having been refused by the common council, this suit was brought, and he was awarded damages in the sum of one thousand dollars.

By the charter of the city of Detroit the common council is authorized to erect and maintain market houses, establish markets and market places, etc.

It is contended by counsel for the city that when the common council of the city authorized the making of plans and specifications for the market building, and directed the making of the contracts for its construction, it performed a purely legislative function; that the fault which occasioned the collapse of the building was in the plan, which failed to provide for anchoring it so that it could not be lifted from its foundation by the wind; that there was evident miscalculation as to the weight being sufficient to keep it in place. Counsel insists that the fault is with legislative action, and therefore a suit grounded upon it is grounded upon a wrong attributable to the legislative body itself, as the determination to construct the public work and the prescribing of the plans, are matters of legislation on behalf of the city, under the direction of its legislative body; that in carrying out the plans there may be negligence attributable to ministerial officers, but negligence in the plans themselves must be attributable to the body that devised, ordered, or adopted them,—and therefore the action cannot be maintained, under the principle applied in *Larkin v. County of Saginaw*, 11 Mich. 88; 82 Am. Dec. 68; *Detroit v. Beckman*, 34 Mich. 125; 22 Am. Rep. 507; *Lansing v. Toolan*, 87 Mich. 152; *Davis v. Mayor of Jackson*, 61 Mich. 580.

This contention would undoubtedly be correct if the city had been acting purely in a matter of public concern, in its governmental capacity or character, and the cases cited would then be applicable. In *Larkin v. County of Saginaw*, 11 Mich. 88, 82 Am. Dec. 68, the plaintiff sought to recover for damages caused by a defective bridge, and it was held that the county was not liable for the acts of the board of supervisors in the exercise of its legislative power. In *Detroit v. Beck-*

man, 34 Mich. 125; 22 Am. Rep. 507; *Lansing v. Toolan*, 37 Mich. 152, and *Davis v. Mayor of Jackson*, 61 Mich. 530, the actions were for injuries caused by defects in public highways. In each of these cases it was held that, when complaint is made that the original plan of a public work is so defective as to render the work dangerous when completed, the fault is with legislative action, for which no action can be maintained: *Ashley v. Port Huron*, 35 Mich. 296; 24 Am. Rep. 552, is to the same effect.

Judge Dillon, in his work on Municipal Corporations, 4th ed., sec. 66, states the rule as follows: A municipal corporation, "possesses a double character: The one, governmental, legislative, or public; the other, in a sense, proprietary or private. The distinction between these, though sometimes difficult to trace, is highly important, and is frequently referred to, particularly in the cases relating to the implied or common-law liability of municipal corporations for the negligence of their servants, agents, or officers, in the execution of corporate duties and powers. On this distinction, indeed, rests the doctrine of such implied liability. In its governmental or public character, the corporation is made, by the state, one of its instruments, or the local depository of certain limited and prescribed political powers, to be exercised for the public good on behalf of the state rather than for itself. In this respect it is assimilated, in its nature and functions, to a county corporation, which, as we have seen, is purely part of the governmental machinery of the sovereignty which creates it. Over all its civil, political, or governmental powers the authority of the legislature is, in the nature of things, supreme and without limitation, unless the limitation is found in the constitution of the particular state. But, in its proprietary or private character, the theory is that the powers are supposed not to be conferred, primarily or chiefly, from considerations connected with the government of the state at large, but for the private advantage of the compact community which is incorporated as a distinct legal personality or corporate individual; and as to such powers, and to property acquired thereunder, and contracts made with reference thereto, the corporation is to be regarded, *quo ad hoc*, as a private corporation, or at least not public in the sense that the power of the legislature over it, or the rights represented by it, is omnipotent."

This rule is supported by a great number of authorities

from the several states, and from the decisions of the supreme court of the United States in the note to the section above quoted. It is, however, challenged by Denio, C. J., in *Darlington v. Mayor*, 31 N. Y. 164, 88 Am. Dec. 248. He asserts the unlimited power of the legislature over municipal corporations and their property, and maintains that such corporations are altogether public, and all their rights and powers public in their nature, and that their property, though held for income or sale, and unconnected with any use for the purposes of municipal government, is under the control of the legislature, and not within the provisions of the constitution protecting private property. He denies the distinction between the public and private functions of city governments, and maintains that, as respects the state, all their powers and functions are public. This doctrine, however, has not obtained in this state; but it is held that cities are mentioned in our constitution, in connection with local corporations, which are put upon a popular basis entirely beyond legislative interference, so far as local independence of action is concerned: Opinion of Campbell, C. J., in *People v. Hurlbut*, 24 Mich. 86; 9 Am. Rep. 103.

In *Board of Park Com'rs v. Common Council*, 28 Mich. 228, 15 Am. Rep. 202, it was said by Mr. Justice Cooley: "We also referred, in *People v. Hurlbut*, 28 Mich. 86, 9 Am. Rep. 103, to several decisions in the federal supreme court and elsewhere, to show that municipal corporations, considered as communities endowed with peculiar functions for the benefit of their own citizens, have always been recognized as possessing powers and capacities, and as being entitled to exemptions, distinct from those which they possess or can claim as conveniences in state government. If the authorities are examined, it will be found that these powers and capacities, and the interests which are acquired under them, are usually spoken of as private, in contradiction to those in which the state is concerned, and which are called public; thus putting these corporations, as regards all such powers, capacities, and interests, substantially on the footing of private corporations."

This same distinction was also made in *Detroit v. Corey*, 9 Mich. 165; 80 Am. Dec. 78; *Mayor etc. v. Park Com'rs*, 44 Mich. 602; *Niles Water Works v. Mayor etc.*, 59 Mich. 324; *Cooper v. Detroit*, 42 Mich. 584.

Under the facts in this case, the city must be held to the same degree of care, not only in the construction, but in the plan of the construction itself, as would a private corporation

or an individual. Under the provisions of the charter granting the power to erect it, there was no imperative duty cast upon the city to provide for a market building. It could build it or not, as the council might determine. It is not like the case of a public highway, or the building of a bridge, where the duty is cast upon the municipality, by general law, to build and maintain them. Had this building been owned by an individual or a private corporation, the liability of either for this accident would not have been questioned, under the facts stated.

The judgment must be affirmed, with costs.

MUNICIPAL CORPORATIONS. — LIABILITY FOR DEFECTS IN PUBLIC BUILDINGS: See extended note to *Godley v. Hogerty*, 59 Am. Dec. 738. A child attending a public school in a schoolhouse provided by a city under the duty imposed by the general laws cannot maintain an action against the city for an injury caused by its unsafe condition: *Hill v. Boston*, 122 Mass. 344; 23 Am. Rep. 332, and note; *Wison v. Newport*, 13 R. I. 454; 43 Am. Rep. 35, and note; nor is a city liable for neglect to provide a safe and suitable building in which to hold town meetings: *Eastman v. Meredith*, 36 N. H. 284; 72 Am. Dec. 302, and note; nor for injuries caused by the fall of a public market building caused by a cyclone: *Flori v. St. Louis*, 69 Mo. 341; 33 Am. Rep. 504. See extended note to *Jacksonville v. Ledwith*, 23 Am. St. Rep. 582. A city constructing a work which is its own private property and not a mere public easement, which is done under city contract, is liable for injuries caused by neglect in its construction: *O'Leary v. Commissioners*, 79 Mich. 281; 19 Am. St. Rep. 169; but it is not liable for injuries caused by the plan of a public work, unless such plan must necessarily result in a direct invasion of private property: *Detroit v. Beckman*, 34 Mich. 125; 22 Am. Rep. 507. A city is bound to keep in repair the pavement in front of the stalls of a market which it owns, and from which it derives revenue by way of rents, although from want of funds it cannot repair its streets: *Mayor v. Cullens*, 38 Ga. 334; 95 Am. Dec. 393, and note.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

ULRICH v. St. Louis.

[112 MISSOURI, 133.]

MUNICIPAL CORPORATIONS — RIGHT TO FINE AND IMPRISON. — The right to make by-laws and ordinances gives to a city, without any express grant of power, the incidental right to enforce them by reasonable pecuniary penalties, and if authorized so to do, the city may provide by ordinance that the offender may be committed to prison for a limited period, either in the first instance or in default of the payment of such penalty.

MUNICIPAL CORPORATIONS — LIABILITY FOR NEGLIGENCE OF OFFICERS. — A municipal corporation is not answerable in damages for the negligent acts of its officers in the execution of such powers as are conferred on the city or its officers for the public good.

MUNICIPAL CORPORATIONS — LIABILITY FOR NEGLIGENCE OF OFFICERS. — A person who has been committed to a city workhouse in default of the payment of a fine imposed for the violation of an ordinance, and who is kicked by a mule which he has been ordered to harness by the workhouse superintendent, the latter knowing the mule to be vicious, cannot recover damages from the city for the injury received.

C. P. and J. D. Johnson, and J. S. Laurie, for the appellant.

W. C. Marshall, for the respondents.

THOMAS, J. Sherwood, C. J., made a statement and delivered the opinion of division 1 of this court in this case as follows: —

“Action for damages for injuries received by plaintiff while he was imprisoned and employed in the workhouse in satisfaction of a fine imposed for the infraction of a city ordinance. The petition is as follows: —

“Plaintiff states that the city of St. Louis, defendant herein, is and was at the dates hereinafter mentioned a mu-

municipal corporation; that on the — day of — plaintiff was arraigned before the police court of the city for breach of the city ordinance, and fined in the sum of \$ —; that in pursuance of said judgment and fine, and in order to collect and realize the amount thereof by his services and labor in behalf of the city, said city, by its agents, thereupon at once delivered and committed plaintiff to its workhouse, an establishment which it was authorized by law to maintain; that defendants, Joseph Geller and John Bungertner, were superintendents of said workhouse, and were the agents or employees of said city; that by the terms of his sentence plaintiff was required to serve the city forty-five days in said workhouse, and to do and perform such service and labor as was required of him; that whilst so confined and employed he was ordered and directed by defendants to hitch to a vehicle a certain pair of mules, and was required to obey, and whilst attempting so to do he was, without fault of his, violently kicked in the breast by one of said mules, whereby three of his ribs were broken, and he was occasioned great pain and anguish, and is disabled for life. Plaintiff states that said mule was of a vicious and dangerous disposition, wholly unfit for use and unmanageable, so that it was dangerous to approach or attempt to handle the same; that said animal was owned by the city of St. Louis, and had for a long time been employed by it, and that said city, and its agents and superintendents likewise, well knew the dangerous character of said animal as aforesaid, and that it was consequently unsafe to attempt to use it for any purpose. Plaintiff states that by reason of the premises, he has sustained damages in the sum of twenty thousand dollars, for which he prays judgment and costs.'

"The defendants demurred generally, and were successful in so doing, and the plaintiff failing to plead further, final judgment was given on the demurrer, and plaintiff brings error."

"By paragraph 10 of section 26, article 3, of the charter of the city of St. Louis, the mayor and municipal assembly are given power to impose, collect, and enforce fines, forfeitures, and penalties for the breach of any city ordinance. Any offender who shall neglect or refuse to pay any fine, penalty, and cost that may have been imposed upon him or her shall be committed to the workhouse, or, in case of women, in such place as for them may be provided, until such fine, penalty,

and costs be fully paid; provided, that no such imprisonment shall exceed six months for any one offense. Every person so committed to the workhouse, or such other place aforesaid, shall be required to work for the city at such labor as his or her health and strength will permit, within or without said workhouse or other place, not exceeding ten hours each working day; and for such work the person so employed shall be allowed, exclusive of his or her board, fifty cents a day for each days' work on account of said fine and costs.

"Under this charter provision of the defendant city, there can be no doubt of its power to enforce its ordinances by imprisonment, and this is true, notwithstanding that such ordinances are not strictly penal.

"Whenever the law confers a right or power, it gives the enforcement of that right or power as an incident; everything necessary to making that power or right effectual or requisite to obtain the end is implied: *Parker v. Way*, 15 N. H. 45; 1 Kent's Com. 464; *Moulton v. Reid*, 54 Ala. 320; 9 Bacon's Abridgments, 219, 220; *People v. Eddy*, 57 Barb. 593.

"The origin and reason of such power are given in a standard work on municipal corporations, the learned author expressing himself on this subject thus: 'Since an ordinance or by-law without a penalty would be nugatory, municipal corporations have an implied power to provide for their enforcement by reasonable and proper fines against those who break them. So the right to make by-laws gives to the corporation, without any express grant of power, the incidental right to enforce them by reasonable pecuniary penalties. What is reasonable depends upon the nature of the offense and the circumstances.' 'In this country it is not unusual to provide, in the organic act of municipal corporations, that if fines for violations of by-laws or ordinances are not paid, the offender may be committed to prison for a limited period. And in respect to some offenses, public in their character, the power to imprison in the first instance is often conferred': 1 Dillon on Municipal Corporations, 4th ed., secs. 338, 353.

"The rule of law is well settled in this state that a municipal corporation is not answerable in damages for the negligent acts of its officers in the execution of such powers as are conferred on the corporation or its officers for the public good: *Murtaugh v. St. Louis*, 44 Mo. 479; *Hannon v. St. Louis Co.*, 62 Mo. 313; *Armstrong v. Brunswick*, 79 Mo. 319; *Kiley v.*

Kansas City, 87 Mo. 103; 56 Am. Rep. 443; *Carrington v. St. Louis*, 89 Mo. 208; 58 Am. Rep. 108; *Keating v. Kansas City*, 84 Mo. 415; 2 Dillon on Municipal Corporations, 4th ed., sec. 965 a.

"The same author says: 'The police regulations of a city are not made and enforced in the interest of the city in its corporate capacity, but in the interest of the public. A city is not liable, therefore, for the acts of its officers in attempting to enforce such regulations: *Calwell v. Boone*, 51 Iowa, 687; 33 Am. Rep. 154; *Odell v. Schroeder*, 58 Ill. 353; *Ogg v. Lansing*, 35 Iowa, 495; 14 Am. Rep. 499; *Prather v. Lexington*, 18 B. Mon. 559; 56 Am. Dec. 585; *Elliott v. Philadelphia*, 75 Pa. St. 347; 15 Am. Rep. 591; *McKay v. Buffalo* (carelessly wounding plaintiff), 74 N. Y. 619; nor will it be made liable by ratifying torts of police officers': 2 Dillon on Municipal Corporations, 4th ed., 1197, sec. 975, note 1.

"The city defendant in conducting its workhouse cannot be regarded as doing so as a means of profit or private municipal gain or revenue. It is obvious beyond question that the workhouse in this case was erected and conducted for the public good, and imprisonment therein was only the legitimate exercise of suitable police regulations, such as the city undoubtedly had the power to enact."

The principles announced and the conclusion reached in this opinion are sound and correct, and we approve both; but we will add a few additional observations because of some doubts that have been expressed in relation thereto.

Plaintiff's attorneys have cited *Moulton v. Scarborough*, 71 Me. 267; 36 Am. Rep. 308; *Neff v. Wellesley*, 148 Mass. 487; *Toledo v. Cone*, 41 Ohio St. 149; and *Lewis v. Raleigh*, 77 N. C. 229; and insist that they are in conflict with the foregoing opinion, and that they support the doctrine that a city or town is liable in damages for the negligence of its servants and officers under circumstances similar in principle to the one in hand.

In the case of *Moulton v. Scarborough*, 71 Me. 267, 36 Am. Rep. 308, the question arose on demurrer to plaintiff's petition, which alleged that defendant, the town of Scarborough, owned a ram of vicious disposition, and accustomed to attack and butt persons, all of which was known to defendant, and which defendant carelessly and negligently allowed to run at large, to the danger of the citizens of the state, and that the ram went upon the premises where plaintiff was, and where

she had a right to be, and injured her. We may infer from the opinion of the supreme court of Maine in the case, though it nowhere so appears in the statement, that defendant owned and maintained a farm for the support of the poor, on which it raised cattle, horses, swine, and sheep. The court, after stating that it is not, by statute, the duty of a town to own and carry on a farm on which to keep and support the poor, but that it may lawfully do so if it see fit, says: "If it does so, it is not done in the performance of a public duty enjoined upon it by law, but as a voluntary corporate act. . . . For all matters connected with the management of the farm by its agents and servants; for the proper keeping and restraining of all domestic animals kept upon it by its authority for purposes of profit, it undoubtedly rests upon the same liability as persons."

In *Neff v. Wellesley*, 148 Mass. 487, the town of Wellesley owned a farm and maintained an almshouse thereon, and it was held liable for an injury caused to a third person by the negligence of its employees on such farm, on the ground that it carried on a business for its private benefit. The court, after laying down the general rule of nonliability of a town for the negligence of its agents and servants in the performance of a public duty imposed by law, says: "Whether this rule should be held to apply to the use of a farm for no other purpose than the support of paupers who are a charge upon the town, it is unnecessary to decide. For the jury have found that paupers whose support was chargeable to another town, and to the commonwealth, were boarded for pay upon the defendant's farm, and that persons employed to work upon the highways were also boarded there, and that horses were kept there principally for use in repairing the highways."

In *Toledo v. Cone*, 41 Ohio St. 149, an employee, while employed in improving a vault in the cemetery owned by the city of Toledo, was injured by the negligence of the superintendent of such cemetery, whose orders and directions the employee was required to obey. The supreme court of Ohio held the city liable, upon the ground that the cemetery and vault were a source of benefit and advantage to the corporation, and involved the same responsibility for their unsafe and improper management which pecuniary and proprietary interests entail upon natural persons.

In the North Carolina case it was held that it was the duty of a city, under the constitution and laws of that state, to

provide prisons, to secure the health and comfort of those confined therein, and that a city is liable for injuries caused by noxious air in an unventilated guardhouse in which the injured party had been imprisoned by a policeman for the violation of a city ordinance. The supreme court of that state put its ruling upon the distinct ground that the act complained of was the city's act—the guardhouse, the violated ordinance, and the officer all being the city's. The question is summarily disposed of without argument or citation of authority. Whether that ruling can be sustained upon its peculiar facts we will not at this time undertake to say, but if it is intended to announce the doctrine that a municipality is liable, in damages, for the negligence of its officers in the performance of governmental functions delegated to it by the state, unless liability is created by statute, we think it is not only not in line with the reasoning and grounds of decision in the other cases above cited, but is also in conflict with the general current of authority, whether of adjudged cases or of text writers, and we cannot give it our sanction.

In *Curran v. Boston*, 151 Mass. 505, 21 Am. St. Rep. 465, plaintiff alleged that he was an inmate of the workhouse or house of industry, belonging to the city of Boston, having been convicted of the misdemeanor of not supporting his family, and having been legally sentenced to confinement there; that he was injured while engaged in unloading coal; that he was in the exercise of due care, and that the officers and servants employed in this institution were negligent, and he contended, as the plaintiff here contends, that the city was liable because it had embarked in an enterprise, partly commercial, from which it received a partial remuneration for its expenditures out of a special class in the community, so that the entire expense of conducting the workhouse is not met by taxation. The lower court ruled that plaintiff could not maintain his action, and on appeal to the supreme judicial court of Massachusetts this ruling was affirmed, the court saying: "By the statute authorizing the erection and maintenance of workhouses by a city, a mode of performing a strictly public duty is provided for, which cannot be of any peculiar advantage to the cities or towns instituting them. No such case is presented as exists where a city . . . acts as an agency to carry on an enterprise, to some extent com-

mercial in its character, for the purpose of furnishing conveniences and benefits to such as choose to pay for them."

And again as late as April, 1891, this same court in *Howard v. Worcester*, 153 Mass. 426, 25 Am. St. Rep. 651, decided that "negligence in blasting for the construction of a school-house, the work being purely for the benefit of the public, cannot create any liability against a city unless by force of some statute," the court distinguishing between that case and cases where cities had been held liable for "injuries caused by or in the course of the construction of roads and bridges, by blasting rocks, setting back water," etc.

In *Brown v. Guyandotte*, 34 W. Va. 299, the supreme court of West Virginia held that "a town is not liable for damages for the death of a person, caused by the burning of its jail, while such person was confined therein by town authority for a violation of its ordinances, though such fire was attributable to the wrongful act or negligence of the officers or agents of the town," citing with approval the case of *Murtaugh v. St. Louis*, 44 Mo. 479, where our court held that a city is not liable to a nonpaying patient at its hospital for injuries resulting from the negligence or misfeasance of the officers and servants of the institution. To the same effect in principle are *Gillespie v. Lincoln*, (Neb. June 11, 1892), and *Dodge v. Granger*, 17 R. I. 664, 33 Am. St. Rep. 901.

"To the extent . . . local or special organizations possess and exercise governmental powers, they are, as it were, departments of state; as such, in the absence of any statute to the contrary, they have the privilege and immunity of the state; they partake of the state's prerogative of sovereignty, in that they are exempt from private prosecution for the consequences of their exercising or neglecting to exercise the governmental powers they possess. To the extent that they exercise such powers, their duties are regarded as due to the public, not to individuals; their officers are not agents of the corporation, but of 'the greater public,' the state. No relation of agency existing between the corporation and its officers, with respect to the discharge of these public governmental duties, the corporation is not responsible for the acts or omissions of its officers therein. This is nothing more than an application and proper extension of the rule that the state is not liable for the misfeasance of its officers": 1 Shearman and Redfield on Negligence, sec. 253.

In this case the city of St. Louis was simply in the exercise

of its public, governmental functions delegated to it by the state, from the time the first arrest was made until the injury occurred, in enforcing its ordinances enacted to preserve the peace, safety, and good order of society, and it is no more liable for the negligence of its officers in this respect, than the state would be liable for the negligence of its highest officers in the performance of the same class of duties.

The judgment is affirmed.

SHERWOOD, C. J., BRACE, GANTT, and MACFARLANE, JJ., for the reasons expressed in the opinion of Sherwood, C. J., concur.

BLACK, J., dissents, and BARCLAY, J., expresses no opinion.

MUNICIPAL CORPORATIONS — LIABILITY FOR NEGLIGENCE OF OFFICERS OR AGENTS. — This subject is exhaustively treated in the monographic note to *Goddard v. Harpwell*, 30 Am. St. Rep. 376. A city, while acting in the interests of the public, and as the guardian of the health, peace, and welfare of the public is not liable for the negligent acts of its officers or agents engaged in the execution of its ordinances: *Whitfield v. Paris*, 84 Tex. 431; 31 Am. St. Rep. 69, and note. A municipal corporation maintaining a workhouse, when authorized but not required to do so, does not become answerable for the negligence of its officers on the ground that it voluntarily assumed the duty of maintaining such workhouse: *Curran v. Boston*, 151 Mass. 505; 21 Am. St. Rep. 465, and note.

MUNICIPAL CORPORATIONS — POWER TO FINE AND IMPRISON. — A municipal corporation may make penal and provide for the punishment of an act which is already an offense against the state: *Van Buren v. Wells*, 53 Ark. 368; 22 Am. St. Rep. 214, and note. A municipal corporation may enforce by imprisonment the payment of a fine for a violation of its ordinance: *Es parte Green*, 94 Cal. 387. The power to pass an ordinance carries with it the power to enforce its observance by a reasonable penalty: *Mayor v. Yulle*, 3 Ala. 137; 36 Am. Dec. 441; extended note to *Robinson v. Mayor*, 34 Am. Dec. 641; but it has not this power unless it is expressly granted by charter: *State v. Bright*, 38 La. Ann. 1; 58 Am. Rep. 155. See *Bloomfield v. Trimble*, 54 Iowa, 399; 37 Am. Rep. 212, and note; also note to *State v. Bessell*, 21 Am. St. Rep. 418.

BURGER v. MISSOURI PACIFIC RAILWAY Co.

[112 MISSOURI, 238.]

NEGLIGENCE — PROXIMATE CAUSE — SUFFICIENCY OF COMPLAINT. — A petition in an action against a railroad company for personal injury, charging that such company negligently and in violation of a city ordinance, stopped a train across a public street, and that while plaintiff was attempting to cross the street between the cars, such company, without warning, backed its train, thus inflicting the injury, states a good cause of action, and such two alleged causes of action are not independent of each other, or separable in the sense that one only would be the proximate cause of the injury.

NEGLIGENCE — PROXIMATE CAUSE — CAUSAL CONNECTION — INDEPENDENT AGENCY. — The rule that the causal connection between the negligent act and the damage done may be broken by the interposition of an independent responsible human agency, cannot be applied to relieve one of liability for a negligent act by interposing another, also committed by himself.

RAILROADS IN STREETS — DUTY AS TO SIGNALS. — A statute requiring a railroad train approaching a public crossing to give signals by ringing a bell or sounding a whistle, is intended to give warning of the approach of a train, to persons who may be crossing or intending to cross the railroad over a public highway, but it does not follow that no other than the statutory signals are ever required, and such statute has no application to one who is attempting to cross the street by passing between two cars of a train which is blocking the street.

RAILROADS IN STREETS — DUTY TO GIVE SIGNALS. — When a railroad train has wrongfully and unlawfully taken the exclusive occupancy of a public street by stopping longer than is permitted by ordinance, and persons have congregated there to pass, and are passing between the cars, it is a question for the jury whether or not the railroad company may move its train without first giving timely warning of its intention, in order that persons in places of danger may protect themselves.

NEGLIGENCE — WHEN QUESTION FOR JURY. — When a petition charging negligence is sufficient, and the evidence tends to prove its allegations, the question of negligence must be left to the jury for its determination.

NEGLIGENCE — DEGREE OF CARE REQUIRED OF CHILD. — A child is not negligent if he exercises that degree of care which, under like circumstances, would reasonably be expected of one of his years and capacity. Whether or not he has exercised such care in a particular case is a question for the jury.

RAILROADS IN PUBLIC STREETS — ORDINANCES REGULATING. — When a city charter gives it the power of control over its streets, and the city council power to pass any ordinance, "usual or necessary for the well-being of the inhabitants," such city may limit the time which railroad trains may block the street by stopping.

RAILROADS IN STREETS — NEGLIGENCE IN STARTING TRAIN. — In an action to recover for personal injury received while passing between cars of a train unlawfully blocking the street, evidence that the injured party saw others passing between the cars before he attempted to pass is admissible, as bearing upon the negligence of the railroad company, in starting its train without a signal of warning.

H. S. Priest and W. S. Shirk, for the appellant.

Moore and Williams, and Draffen and Williams, for the respondent.

MACFARLANE, J. Plaintiff, who is an infant, prosecutes this suit by his next friend to recover damages from defendant for personal injuries resulting from the alleged negligence of its employees. He obtained judgment in the circuit court, and defendant appealed.

After the formal allegations the petition charged in substance that on the third day of May, 1889, defendant negligently and carelessly obstructed the crossing of one of the public streets of the town of California, known as Oak Street, by standing one of its trains across it more than ten minutes, in violation of an ordinance of said town; that plaintiff was a boy between nine and ten years of age, and lived with his father on the south side of the railroad; that over this street was his usual way to the public school, which he was attending and which was situate on the north side of the railway; that when plaintiff, on his way to school on said day, reached said crossing, he found a train standing across it; after waiting for some time for it to be moved or uncoupled, on seeing grown persons pass between the cars, he attempted to go through also; that being so young he did not, under the circumstances, anticipate any danger; that when he had gotten partly over, the defendant's servants carelessly and negligently caused said train to back up, without ringing the bell, or sounding the whistle, or giving any signal of starting, by reason whereof he had no notice of the intended moving of said train; that it was defendant's duty, under the laws of this state, to give such signal before starting the train; that by reason of such carelessness and negligence, plaintiff's right foot was caught between the drawheads of said cars and crushed, and had to be amputated.

The sufficiency of this petition to declare a cause of action was questioned, on the trial, by objection to any testimony thereunder, and again, after verdict, by motion in arrest of judgment. These objections were overruled, and the action of the court in doing so is assigned as error in this court.

It is first objected that the petition shows no causal connection between the act of obstructing the crossing and the injury to plaintiff; that the moving of the train was the proximate cause of the injury, and no negligence in doing that is stated.

We do not understand that the maxim, *Causa proxima, non remota, spectatur*, applies in case both negligent acts, conducing to produce the injury, were committed by the person from whom redress is sought. The rule that the causal connection between the negligent act and the damage may be broken by the interposition of an independent responsible human agency, cannot be applied to relieve one of liability for one negligent act by interposing another, also committed by himself.

Besides we do not think the two negligent acts charged in this petition are independent of each other. They both unite in constituting one act of negligence — the negligent management of the train, and both concur in producing the damage.

The idea is aptly expressed by Woodward, J., in an opinion in a case in which a child undertook to pass under a train standing across a street, and was injured by the negligent starting of the cars before he had passed through. He says: "Now adjust the acts of stopping and starting ever so nicely to the maxim *causa proxima*, and not a step of advance is taken by the defense, for the company is equally liable for both causes. If you say it was the starting and not the stopping of the cars that did the mischief, the question of plaintiff's negligence in suffering his son to be under them is still in the case, but you have made no progress in the defense, because, if there was wrong in the start, the company are as responsible for it as for any wrong in the stop. The nature of the case, however, does not admit of this nice distinction. The conduct of that train of cars was one thing — intrusted as a special duty to one man, and if his mismanagement injured the plaintiff, without fault on the plaintiff's part, the company are liable for it. To split such a single, simple, individual cause into two causes, and to christen them *proxima* and *remota*, is to embarrass ourselves unnecessarily, and to obstruct the course of justice": *Pennsylvania R. R. Co. v. Kelly*, 31 Pa. St. 377; *Nagel v. Missouri Pac. R. R. Co.*, 75 Mo. 653; 42 Am. Rep. 418; *Hayes v. Michigan Cent. R. R. Co.*, 111 U. S. 228; *Baltimore etc. R. R. Co. v. Reaney*, 42 Md. 117.

The negligent and unlawful obstruction of the street continued until the negligent starting of the cars commenced, and the two alleged causes of the injury were not separable in the sense that one only would be the proximate cause of the damage.

2. It is next insisted, as an objection fatal to the sufficiency of the petition, that it was not the duty of defendant, under the circumstances alleged in the petition, to give warning of the starting of the train.

It is argued, we think correctly, by counsel for defendant, that the duty of giving the statutory signals of ringing the bell or sounding the whistle, has no application to one, situated as plaintiff was, in the middle of the train and between two cars, but was intended to give warning of the approach of a train to persons who might be crossing, or intending to

cross, the railroad over a public highway. Indeed, the language of the statute admits of no other construction: Rev. Stats. 1889, sec. 2608; *Stillson v. Hannibal etc. R. R. Co.*, 67 Mo. 677; *Dahlstrom v. St. Louis etc. R'y Co.*, 96 Mo. 101.

We do not think it follows from the fact that the statute only enjoins these crossing signals, that no others are required under any circumstances. Our courts have declared over and over again that the greatest diligence, watchfulness, and care should be observed by those running and operating trains in towns and cities, especially on and over streets and other public places therein. These duties they owe to everyone who has the right to use such public places in common with them.

According to the allegations of the petition, defendant had wrongfully and unlawfully taken the exclusive occupancy of one of the most commonly traveled streets of the town, and that too at an hour when much used by children on their way to school. Persons, plaintiff among them, had been interrupted in their lawful use of the street, some of whom were passing through between the cars. Under these circumstances it is charged that defendant negligently started its train without warning.

We think the petition states a cause of action. If persons had congregated on the streets about the train, waiting an opportunity to pass, and others were climbing over couplings between the cars, it was surely a question whether it was not the duty of those in charge of the train to give timely warning of their intention to move it, in order that persons in places of danger might protect themselves from injury: *Barkley v. Missouri Pac. R'y Co.*, 96 Mo. 378; *Philadelphia etc. R. R. Co. v. Layer*, 112 Pa. St. 414.

3. Defendant moved for a nonsuit at the close of all the evidence, upon two grounds: 1. That the evidence did not show negligence on the part of defendant; and, 2. That the evidence did show such contributory negligence on the part of plaintiff as should prevent his recovery. This motion was denied, and the ruling of the court in doing so is assigned as error.

The facts, as disclosed by the evidence, and about which there is no real controversy, were in substance as follows: On the third day of May, 1889, plaintiff was nine years and ten months old, and was a bright, intelligent, and active boy. He lived with his parents a few blocks south and east of the

railroad. The railroad runs through the town east and west, and Oak Street, which was one of the principal streets of the town, ran north and south across the railroad. There were two sidetracks and one main track across Oak Street. The schoolhouse was on the north side of the railroad, and over Oak Street was the usual route from the house of plaintiff to school. On said day plaintiff, accompanied by his sister, thirteen years of age, started to school and traveled down Oak Street, as usual, to the railroad, where they found a train of freight cars standing on one of the sidetracks across the street. After waiting there some fifteen minutes, and hearing, as he testified, the school bell ringing, plaintiff put his hands upon the cars and his foot between the drawheads, and, just as he went to go over, the train came back together and caught his foot between the drawheads; he stooped down and pulled out the coupling pin, and the rest of the train started up. Amputation of the foot was necessary.

Plaintiff testified that a man crossed before him. He admitted that he had been told by his parents that it was dangerous to attempt to cross over trains, and warned not to do so; he knew about signals of whistling and ringing bells on engines, and that there was a street three hundred feet west of this crossing on which he could have crossed the track, and by which he could have gone to school. The evidence tended to prove that when the train moved back no signal was given. None of the men in charge of the train knew that plaintiff was at the time attempting to cross over it, or that he was about it or in anywise in danger.

The court admitted over defendant's objection the charter of the town and an ordinance prohibiting the obstruction of streets by trains for more than ten minutes at any one time.

It will be seen that the evidence tends to prove the allegations of the petition which charge negligence of defendant. The petition being sufficient, as has been seen, and the evidence tending to prove its charges, a case was made for the determination of the jury as to the negligence of defendant.

It is insisted that the act of plaintiff, having the intelligence, experience, knowledge and general capacity he was shown by the evidence to possess, in placing himself on the coupling between two cars in a train, to which an engine was attached, was such contributory negligence as precluded a recovery.

It must be conceded that for a boy of his age plaintiff was

shown to possess unusual capacity. He was bright, intelligent, and active, had some knowledge of the movement of trains and the use of train signals, and admitted that he knew it was dangerous to undertake to pass through between cars in a train, and had been warned by his parents not to attempt to do so. It also appeared that another convenient and unobstructed route to school was open to him. It may also be conceded that the act of plaintiff, when measured by the standard applied to an adult person of ordinary prudence, was a negligent act: *Hudson v. Wabash etc. R'y Co.*, 101 Mo. 13; *Corcoran v. St. Louis etc. R'y Co.*, 105 Mo. 899; 24 Am St. Rep. 394.

It was said in *Spillane v. Missouri Pac. R'y Co.*, 111 Mo. 555, that, "no arbitrary rule can be established, fixing the age at which a child, without legal capacity for other purposes, may be declared wholly capable or incapable of understanding and avoiding dangers to be encountered upon railway tracks. It is a question of capacity in each case." Common experience and observation teach us that due care on the part of an infant does not require the judgment and thoughtfulness that would be expected of an adult person under the same circumstances. In the conduct of a boy, we expect to find impulsiveness, indiscretion, and disregard of danger, and his capacity is measured accordingly. A boy may have all the knowledge of an adult respecting the dangers which will attend a particular act, but at the same time he may not have the prudence, thoughtfulness, and discretion to avoid them, which are possessed by the ordinarily prudent adult person. Hence, the rule is believed to be recognized in all the courts of the country, that a child is not negligent if he exercises that degree of care which, under like circumstances, would reasonably be expected of one of his years and capacity. Whether he used such care in a particular case, is a question for the jury: *Beach on Contributory Negligence*, sec. 117; *Eswin v. St. Louis etc. R'y Co.*, 96 Mo. 290; *O'Flaherty v. Union R'y Co.*, 45 Mo. 70; 100 Am. Dec. 343; *Plumley v. Birge*, 124 Mass. 57; 26 Am. Rep. 645; *Meibus v. Dodge*, 38 Wis. 300; 20 Am. Rep. 6; *Western etc. R. R. Co. v. Young*, 81 Ga. 397; 12 Am. St. Rep. 320.

4. Defendant insists that the ordinances of the city, limiting the time streets might be obstructed by trains to ten minutes, was not authorized by any provision of the charter.

We think ample authority was granted this city under its

charter to authorize the council to pass the ordinance in question. The charter gave the city the right and control over the public streets and the council power to pass any ordinance "usual or necessary for the well-being of the inhabitants."

The general grant of power to municipal corporations to pass ordinances or by-laws for the general welfare, gives authority to pass by-laws, "reasonable in their character, upon all other matters [not authorized by special grant] within the scope of their municipal authority, and not repugnant to the constitution and general laws of the state": 1 Dillon on Municipal Corporations, secs. 815, 816.

5. During the trial the court permitted witnesses to testify that while plaintiff was waiting for the train to be moved he saw men pass over between the cars. We do not think there was error in this. The evidence bore upon the question of the negligence of defendant in starting the train without signal. If persons were climbing over the train, and were in places of danger about it, due care would have required notice that it would move. The evidence tends to show the situation of persons about the train and was admissible. The same character of evidence was admitted without objection in the cases of *Gurley v. Missouri Pac. R'y Co.*, 104 Mo. 215; *Brown v. Hannibal etc. R. R. Co.*, 50 Mo. 461; 11 Am. Rep. 420; *Stillson v. Hannibal etc. R. R. Co.*, 67 Mo. 672; *Philadelphia etc. R. R. Co. v. Laver*, 112 Pa. St. 414; and *Thurber v. Harlem Bridge etc. R. R. Co.*, 60 N. Y. 826.

We think the instructions given by the court in harmony with the legal principles herein announced, and that no error was committed.

The judgment is accordingly affirmed.

NEGLIGENCE — PROXIMATE CAUSE — INTERVENING AGENCY. — The proximate cause is not necessarily the last act nor the nearest act to the injury, but may be such an act wanting in ordinary care as actively aids in producing the injury as a direct and existing cause: *Gonzales v. Galveston*, 84 Tex. 3; 31 Am. St. Rep. 17, and note; *Railroad v. Kelly*, 91 Tenn. 699; 30 Am. St. Rep. 902, and note with the cases collected.

NEGLIGENCE — WHEN A QUESTION FOR THE JURY. — When the evidence is conflicting, the question of negligence is properly one for the jury: *Texas etc. R'y Co. v. Robertson*, 82 Tex. 657; 27 Am. St. Rep. 929; *Hinkle v. Richmond etc. R. R. Co.*, 109 N. C. 472; 26 Am. St. Rep. 581, and note; and whether the evidence adduced is sufficient to prove negligence is for the determination of the jury: *Carter v. Oliver Oil Co.*, 34 S. C. 211; 27 Am. St. Rep. 815, and note.

NEGLIGENCE — MEASURE OF LIABILITY OF CHILDREN FOR. — The measure of the responsibility of a child for negligence is his capacity to see and appreciate danger: *Kehler v. Schoenk*, 144 Pa. St. 348; 27 Am. St. Rep. 633, and note; note to *Gunn v. Ohio etc. R. R. Co.*, 32 Am. St. Rep. 854. The care exercised by a child should be measured by the degree of capacity he is found to possess: *Illinois Cent. R. R. Co. v. Slater*, 129 Ill. 91; 16 Am. St. Rep. 242, and note; *Strawbridge v. Bradford*, 128 Pa. St. 200; 15 Am. St. Rep. 670, and note; *Western etc. R. R. Co. v. Young*, 81 Ga. 397; 12 Am. St. Rep. 320, and note. See also the extended note to *Westbrook v. Mobile etc. R. R. Co.*, 14 Am. St. Rep. 590.

RAILROADS. — THE STAKING OF CARS ACROSS A HIGHWAY in the railroad company's yard is not an unlawful act, nor is it negligence *per se*: *Kelly v. Michigan etc. R. R. Co.*, 65 Mich. 186; 8 Am. St. Rep. 876, and note; but in the following cases it was held to be negligence *per se*, to obstruct, in violation of an ordinance, with standing cars, a public street in actual daily use by the public: *Central R. R. Co. v. Curtis*, 87 Ga. 416; *McClain v. Brooklyn etc. R. R. Co.*, 116 N. Y. 459; and see also on this point, *Helbig v. Michigan etc. R. R. Co.*, 85 Mich. 359.

RAILROADS — NEGLIGENCE — CLIMBING OVER STATIONARY CARS. — The act of climbing over standing cars is such contributory negligence as to preclude any recovery for injuries received while doing so: *Corcoran v. St. Louis etc. R'y Co.*, 105 Mo. 399; 24 Am. St. Rep. 394, and note; *Howard v. Kansas City etc. R. R. Co.*, 41 Kan. 403; and in the following case it was held so in the case of a child who attempted to climb over a train standing across a public street: *Atchison etc. R. R. Co. v. Plaskett*, 47 Kan. 112.

HOPE v. BARKER.

[112 MISSOURI, 333.]

NEGOTIABLE INSTRUMENTS — INTEREST AS AFFECTING NEGOTIABILITY. —

A note, otherwise negotiable, which provides that it shall be, "without interest thereon if paid at maturity, if not paid at maturity to bear ten per cent interest from date," is not thereby rendered uncertain as to the amount to be paid, nor deprived of its negotiability.

James T. Burney, for the appellant.

Noah M. Givan, for the respondent.

BLACK, J. This case was certified to this court by the Kansas City court of appeals. The plaintiff sued the defendant as an indorser of the following notes:—

"\$194.25.

LEE'S SUMMIT, December 14, 1887.

"One year after date I promise to pay to the order of Dell Barker, agent, \$194.25, without interest thereon if paid at maturity. If not paid at maturity, to bear ten per cent interest from date. For value received. Negotiable and payable at the Bank of Belton, Belton, Missouri.

"JOHN E. WATSON."

It is agreed that if this is a negotiable promissory note, the judgment must be affirmed; but if it is a nonnegotiable note, then the judgment should be reversed. An additional statement of the facts is therefore unnecessary. The claim of the defendant is that the words, "without interest thereon if paid at maturity; if not paid at maturity, to bear ten per cent interest from date," render the note uncertain as to the amount to be paid, and for this reason it is not a negotiable promissory note.

It is everywhere agreed that one of the rules in regard to negotiable paper is that the amount to be paid must be certain, and not made to depend on a contingency. There is, however, some difference of opinion in the application of the rule. In *First Nat. Bank v. Gay*, 63 Mo. 33, 21 Am. Rep. 430, the note, besides a promise to pay a certain sum at a specified date with interest from maturity at a given rate, contained these words: "And if not paid at maturity, and the same is placed in the hands of an attorney for collection, we agree and promise to pay an additional sum of ten per cent as attorney's fees." This promise to pay an attorney's fee was held to destroy the negotiable character of the note, because the payment of a part was uncertain, and made to depend upon a contingency. That ruling has been followed in subsequent cases, and is now the settled law of this state, whatever may be the rule in such cases elsewhere: *Samstag v. Conley*, 64 Mo. 476; *First Nat. Bank v. Marlow*, 71 Mo. 618; *First Nat. Bank v. Jacobs*, 73 Mo. 35. To load down negotiable paper with such contingent collateral contracts can have no other effect than to destroy the simplicity of such paper; and we do not depart in the least from the rule declared in these cases. The rule as to the degree of certainty required in the statement of the amount to be paid may be illustrated by other well-known examples. Thus it is held that the negotiable character of a note or bill is destroyed by adding to the promise to pay a specified sum such words as these: "All other sums which may be due"; "all fines according to rule"; "the demands of the sick club at, etc., in part of interest": 1 Parsons on Notes and Bills, 37.

But it seems to us it ought to be conceded without argument that the cases before cited and the illustrations just given are entirely unlike the case now in hand. Tiedeman says: "It is also somewhat common in notes that are payable

in installments to provide that, if the maker shall fail to pay any one of the installments, the whole sum shall become due and payable. Such a note is held to be negotiable." He cites *Carlton v. Kenealy*, 12 Mees. & W. 139, which sustains the text. He goes on to say: "It is also sometimes provided in notes that, if any installment of interest should not be paid, the whole debt, principal and interest, shall then become due and payable. Such a note would undoubtedly be recognized as negotiable, there being no difference in principle between it and the note which is made to fall due upon the failure to pay an installment of the principal": Tiedeman on Commercial Paper, sec. 25 d. In *Towne v. Rice*, 122 Mass. 67, it is said: "An additional rate of interest is provided for if the note shall not be met at maturity; but, as the sum to be paid is still definite and payable absolutely, this cannot affect the negotiability." And in *Riker v. Sprague Mfg. Co.*, 14 R. I. 402; 51 Am. Rep. 413, it is held that the reservation in a note of the right to pay the same before maturity, in installments of not less than five per cent of the principal, does not render the note uncertain as to the amount or terms of payment.

It is held in Pennsylvania, as by this court, that these conditional "collection-fee" contracts destroy the negotiability of a note, and in the discussion of such a case it was said: "Interest and costs of protest after nonpayment at maturity are necessary legal incidents of the contract, and the insertion of them in the body of the note would not affect its negotiability. . . . But a collateral agreement, as here, depending too, as it does, upon its reasonableness, to be determined by the verdict of a jury, is entirely different": *Woods v. North*, 84 Pa. St. 407; 24 Am. Rep. 201.

Interest is but an incident to the debt, and it is a thing as to which it is usual and customary to contract even in negotiable paper. Surely, it cannot be maintained that a note ceases to be negotiable because of the addition of such words as, "with interest from maturity at the rate of eight per cent per annum." This is but another way of expressing an agreement that if the note is not paid at maturity it shall from that time bear interest at the rate of eight per cent per annum. The only difference in the case just supposed and the one in hand is, that here the principal is to bear interest from the date of the note if not paid at maturity, instead of bearing interest from and after maturity. In both cases the

amount to be paid is fixed, definite, and certain. The judgment of the Kansas City court of appeals is, therefore, affirmed, that court having affirmed the judgment of the circuit court.

NEGOTIABLE INSTRUMENTS. — STIPULATIONS AS TO INTEREST NOT AFFECTING NEGOTIABILITY: See notes to *Jennings v. First Nat. Bank*, 16 Am. St. Rep. 214, and *Citizens Nat. Bank v. Piollet*, 12 Am. St. Rep. 862. A note providing for "interest at ten per cent per annum until paid, seven if paid when due," is not rendered nonnegotiable by this provision: *Smith v. Orana*, 83 Minn. 144; 53 Am. Rep. 20, and especially the note to this case. See note to *Woolley v. Sergeant*, 14 Am. Dec. 423; also *Kirk v. Dodge County etc. Ins. Co.*, 39 Wis. 138; 20 Am. Rep. 39.

STATE v. MASON.

[112 MISSOURI, 374.]

FRAUDULENT CONVEYANCES — QUESTION FOR JURY. — When a sale is attacked for fraud by the creditors of the vendor, and the consideration claimed for the sale is the surrender of certain notes against the latter, the validity of such notes is for the jury to determine from all the facts and circumstances in evidence.

EVIDENCE. — A RECITAL IN AN EXECUTOR'S SETTLEMENT that a certain sum was received from a specified person, when placed in evidence to show payment of a note, may be explained.

FRAUDULENT CONVEYANCES — KNOWLEDGE OF VENDEE AS AFFECTING VALIDITY OF SALE. — A sale, though made by a vendor with fraudulent intent, will not be declared void unless the vendee had actual knowledge and notice of such intent. Knowledge of facts, which, if investigated and followed out, would lead to knowledge of the fraud, is not sufficient to invalidate the transaction.

FRAUDULENT CONVEYANCES — PREFERENCE TO CREDITORS — GUILTY KNOWLEDGE. — When a preference is given by an insolvent debtor to one or more creditors who receive goods in satisfaction of *bona fide* debts, actual participation in the fraud is necessary to render the acceptance of the goods fraudulent. Simple knowledge is not sufficient.

FRAUDULENT CONVEYANCES. — INADEQUACY OF PRICE in the sale of property by an insolvent debtor is a badge of fraud, but is not sufficient alone to raise a legal inference of fraud, unless so grossly inadequate as to strike the understanding at once with the conviction that the sale never could have been made in good faith.

FRAUDULENT CONVEYANCES — INADEQUACY OF PRICE — QUESTION FOR JURY. The fact that goods transferred by an insolvent debtor may have been largely in excess of the debt due by him does not of itself make the transaction fraudulent as to other creditors; but it is "ground of inference" from which the jury may draw the conclusion that a preference was made in fraud of other creditors.

FRAUDULENT CONVEYANCES — FRAUD, WHEN QUESTION FOR JURY. — When, in a transaction between an insolvent debtor and his creditor, an inference of fraud may be drawn from all the circumstances, the question should be submitted to the jury as to whether the transaction is fraudulent as to other creditors or not.

D. P. Dyer and David Goldsmith, for the appellant.

C. H. Krum, John C. Orrick, and Frank, Dawson, and Garvin, for the respondent.

MACFARLANE, J. This is an action upon the bond of defendant Mason, as sheriff of the city of St. Louis, to recover damages for taking, under writs of attachment issued in April, 1888, against one Isaac Trepp, and selling certain goods claimed by plaintiff.

The answer admits the seizure and conversion of the goods, but charges that they were in fact the property of the debtor, Isaac Trepp, and were transferred to plaintiff fraudulently, and with intent to hinder, delay, and defraud his creditors.

Isaac Trepp, a merchant doing business in Centralia, Illinois, being in failing circumstances, on the eighteenth day of April, 1883, sold plaintiff and others his entire stock of goods, which were at once moved to St. Louis, where those received by plaintiff were attached by the creditors of Trepp.

The evidence shows that plaintiff Salomon and Trepp were brothers-in-law, having married sisters, who were the daughters of one Martin Frank of New York; that plaintiff was the executor of said Frank, and as such, at the date of the sale of the goods, held three notes against Trepp for three thousand five hundred dollars, three thousand dollars, and two thousand dollars, respectively. Plaintiff claims that the goods in controversy were bought and paid for in settlement of these notes. The good faith of this sale constitutes the matter of controversy in this suit.

1. The court was asked by plaintiff to instruct the jury, as a matter of law, that Trepp was indebted to plaintiff, at the date of the sale and transfer of the goods, in the full amount of the said three notes, unless the three thousand five hundred dollar note had been paid, and that the burden of proving payment was on defendant.

There was no direct evidence tending to impeach the validity of the three notes; but the evidence did tend to prove payment of the one for three thousand five hundred dollars. The instruction was asked on the theory that the notes were *prima facie* valid, and proof of their invalidity should be made by defendant.

The issue in the case was whether the sale was fraudulent, and not whether the notes were valid. The question of the validity of the notes therefore was only incidentally involved

in the issue. They only represented the consideration for the transfer of the goods, and, as between the maker and the payee, were *prima facie* valid.

The consideration of the sale was one of the necessary elements of its validity. The only consideration shown or claimed by the parties to the transaction was the surrender and cancellation of these notes. If the notes evidenced valid subsisting debts, then they constituted a sufficient consideration, as between the parties, for the sale of the goods; but when the validity of the sale is challenged by third parties on the ground of fraud, every part of the transaction, including the validity of the consideration, is subject to investigation. We do not think that notes or other evidences of indebtedness between the parties to alleged fraudulent transactions are, as a matter of law, to be declared valid. Such evidence is too easily manufactured to be allowed conclusively to uphold a transaction the good faith of which is questioned. In determining such question, the jury should be allowed to judge of the whole transaction from all the facts and circumstances in evidence. There was no error in refusing the instruction.

2. At the trial, for the purpose of proving that the three thousand five hundred dollar note had been paid prior to the sale, the defendant introduced in evidence the settlement of plaintiff as executor of Frank, one item thereof with which he had charged himself being, "cash from Isaac Trepp, three thousand five hundred dollars." Defendant also read a deposition of plaintiff taken in another suit involving the validity of the same sale. In this deposition the plaintiff was given an opportunity to explain the charge of three thousand five hundred dollars contained in the settlement.

In rebuttal plaintiff offered to read a deposition of one McIntyre, the lawyer who prepared the settlement for him. By this witness plaintiff offered to prove that, when the settlement was made, he had told witness that three thousand dollars of the three thousand five hundred dollar charge in the settlement was the three thousand dollar note which the wife of plaintiff, as heir of Martin Frank, deceased, received as a distributive share in the estate, and five hundred dollars he himself had paid to the estate on the note. This evidence was excluded by the court.

The fact which the insertion of the item in the settlement tended to prove was in the nature of a declaration, on the part of plaintiff, that the three thousand five hundred dollar

note had been paid. We think what plaintiff said at the time, in explanation of the act, was admissible as a part of the transaction. The act of inserting the item in the settlement should be viewed, and its effect judged, in the light of the verbal acts of plaintiff while doing or directing it. They were admissible as indicating the intention at the time, "and are, therefore, admitted in proof like any other material facts": 1 Greenleaf on Evidence, 15th ed., sec. 108; *State v. Gabriel*, 88 Mo. 638, and authorities cited.

3. The court instructed the jury, on request of defendant, in effect: That if the sale was made by Trepp with intent to hinder, delay, or defraud his creditors, and plaintiff "knew or had good reason to know of such intent" at the time, and that the value of the goods transferred was "largely in excess" of the amount then actually due on said three notes, the sale was fraudulent and void.

A sale, though made by the vendor with a fraudulent intent, will not be declared void unless the vendee had actual notice and knowledge of such intent. The knowledge of facts, which, if investigated and followed out, would lead to knowledge of the fraud, is not deemed sufficient under the decisions of this court. It is, "not the duty of every purchaser of goods to inquire into the motives of the vendor in making the sale; for such a rule would hamper the transfer of personal property to an extent which would be detrimental to commerce and subversive of the policy which encourages free and unlimited traffic in such property": *Van Raalte v. Harrington*, 101 Mo. 610; 20 Am. St. Rep. 626, and cases cited; *Carroll v. Hayward*, 124 Mass. 120.

The court goes further yet, in the proof required to establish fraud in a preference given by an insolvent debtor to one or more creditors, when goods are taken in satisfaction of *bona fide* debts. In such case the creditor has the right to look after his own interest, and is not required to consult the interest of the other creditors; an actual participation in the fraud is necessary to make his acceptance of the goods fraudulent. Simple knowledge is not enough: *Sexton v. Anderson*, 95 Mo. 379, and cases cited; *Holmes v. Braidwood*, 82 Mo. 610.

It is evident that the instruction is improper in predicating fraud in the sale upon the fraudulent intent on the part of the vendor, and only "good reason to know of such intent" by the vendee.

4. Omitting from the instructions that part relating to the

knowledge of plaintiff of the fraudulent intent of Trepp, does enough remain to make it a proper declaration of law? If the vendor intended fraud, and the value of the goods was largely in excess of the debts surrendered, would the sale be fraudulent, as to the other creditors, as a matter of law?

There is no doubt that inadequacy of price in the sale of property by an insolvent debtor is a badge of fraud; but it is not regarded sufficient alone to raise a legal inference of fraud, unless so grossly so as to "strike the understanding at once with the conviction that such a sale never could have been made in good faith": Bump on Fraudulent Conveyances, 44, 45; *Ames v. Gilmore*, 59 Mo. 549; 8 Am. & Eng. Ency. of Law, 760.

The fact that the goods transferred may have been largely in excess of the amount due on the three notes did not itself make this transaction fraudulent. It "might be grounds of inference" from which the jury may have drawn the conclusion that the preference was made in fraud of other creditors, and the instruction should have been so framed as to permit the jury to draw the inference: Bump on Fraudulent Conveyances, 34; 8 Am. & Eng. Ency. of Law, 770.

The value of the goods sold and the amount due on the notes were both disputed facts, which must have been known before the value and price could have been compared, and the adequacy or inadequacy determined. The words "largely in excess" used in the instructions are too indefinite to convince the understanding, as an inference of law, that the transfer was made in bad faith. We think the court erred in giving this instruction.

5. Plaintiff insists that, unless one or more of the notes had been paid, there was no evidence of fraud in the case, and the court should have so instructed the jury. Without undertaking to review the evidence, but after a careful consideration of it, we conclude that it was sufficient to authorize the submission of the issues to the jury. Fraudulent transactions are not committed openly, and in the light of day, but generally with secrecy, and with a view of concealing the evidence of it. Fraud must, therefore, generally be inferred from all the facts and circumstances which characterize the transaction. Where an inference of fraud may be drawn from all the circumstances the question should be submitted to the jury.

Other errors are assigned, but we find no other ruling which

constitutes reversible error, or which demands special consideration.

For the errors indicated, the judgment will be reversed and the cause remanded.

FRAUDULENT CONVEYANCES — KNOWLEDGE OF VENDEE AS AFFECTING VALIDITY OF. — When a creditor or other person purchases property either real or personal from a debtor in failing circumstances, three things must usually concur to protect the purchaser's title: 1. He must buy without notice of the fraudulent intent on the part of the vendor; 2. He must be a purchaser for a valuable consideration; and 3. He must have paid the purchase money without knowledge of the fraud. It follows that one who has purchased property paying a valuable consideration therefor in good faith without notice of the fraudulent purpose of the grantor acquires a good title as against the latter's creditors: *Gallbreath v. Cook*, 30 Ark. 417; *Carnahan v. McCord*, 116 Ind. 67; *Smith v. Selk*, 114 Ind. 229; *Des Moines Ins. Co. v. Lent*, 75 Iowa, 522; *Paul v. Baugh*, 85 Va. 955; *Hedman v. Anderson*, 6 Neb. 392. "But the consideration paid, though valuable, may have been inadequate. The inadequacy of the consideration does not necessarily avoid the transfer. It is, however, a material fact, to be considered by the jury as a badge of fraud; and may operate to avoid the transfer when, either alone or in connection with other facts, it produces the conviction that the transfer was not made in good faith": *Freeman on Executions*, sec. 140. Doubtless the inadequacy may be so gross as "to shock the conscience, and, therefore, to constitute presumptive evidence of fraud": *Kuykendall v. McDonald*, 15 Mo. 416; 57 Am. Dec. 212, and note.

Generally speaking no rule of law is better settled than that to render a conveyance which is based upon a valuable consideration, and not fraudulent on its face, voidable and fraudulent as to creditors, there must have been mutuality of participation in the fraudulent intent, on the part both of the vendor and the purchaser: *Hedman v. Anderson*, 6 Neb. 392; *Garland v. Rives*, 4 Rand. 282; 15 Am. Dec. 756; *Kenney v. Dow*, 10 Mart. (La.) 577; 13 Am. Dec. 342; *Smith v. Schmitz*, 10 Neb. 600; *Hatch v. Jordan*, 74 Ill. 414; *Curtis v. Valiton*, 3 Mont. 153; *Gridley v. Bingham*, 51 Ill. 153; *Ewing v. Runkle*, 20 Ill. 448; *Hessing v. McCloskey*, 37 Ill. 341; *Foster v. Hall*, 12 Pick. 89; 22 Am. Dec. 400; *Splawn v. Martin*, 17 Ark. 146; *Partelo v. Harria*, 26 Conn. 480; *Fisfield v. Gaston*, 12 Iowa, 218; *Sterle v. Ward*, 25 Iowa, 535; *Leach v. Francis*, 41 Vt. 670; *Catchings v. Harcrow*, 49 Ark. 20; *Beasley v. Bray*, 98 N. C. 266. An intent on the part of the maker of a deed of trust, in the execution of the instrument to hinder, delay, and defraud his creditors, does not render it fraudulent and void, unless such intent was participated in by the beneficiaries in the deed: *Byrne v. Becker*, 42 Mo. 264. In order to set aside a deed of assignment as fraudulent, the creditors must show not only that the assignment was fraudulent on the part of the assignor, but also that the fraud was participated in by the assignee: *State v. Keeler*, 49 Mo. 548; and in order that a mortgage of real property or of chattels shall be fraudulent and void as against creditors of the mortgagor the intent to hinder and delay them must be entertained by both mortgagor and mortgagee: *Meixsell v. Williamson*, 35 Ill. 529. When a deed or other conveyance is executed to a third person for a valuable and adequate consideration without knowledge on the part of the grantee of any fraudulent intent of the grantor it will be upheld as against his creditors, however fraudulent

his purpose may be. To vitiate the transfer in such case, the grantee must also be chargeable with knowledge of the fraudulent intent of the grantor: *Prewitt v. Wilson*, 103 U. S. 22; *Boeing v. Cargill*, 13 Smedes & M. 79; *Palmer v. Henderson*, 20 Ind. 297; *Blodgett v. Chaplin*, 48 Me. 322; *Pierson v. Tom*, 1 Tex. 577; *Les v. Abbe*, 2 Root, 359; 1 Am. Dec. 78; *Astor v. Wells*, 4 Wheat. 466. The fact that the intention of the debtor in making a mortgage to secure a creditor is fraudulent, is not of itself sufficient to make the mortgage fraudulent as to such creditor, if he in no way participated in the fraud or aided or assisted in the illegal act: *Moline Wagon Co. v. Rummell*, 14 Fed. Rep. 155; and when an insolvent debtor executes a mortgage to bona fide creditors with the design of hindering and delaying other creditors in the enforcement of their claims, and the evidence fails to show that the mortgagees had any intention or purpose of aiding in the fraudulent plans of the mortgagor, except so far as is necessary to secure their own protection, the mortgage will not be fraudulent nor void: *Kohn v. Clement*, 58 Iowa, 589. In order to set aside as fraudulent against creditors, a sale of his personalty or a deed of his realty by a debtor who is insolvent, or in failing circumstances with intent thereby to place his property beyond the reach of creditors, or to hinder, delay, or defraud them, the purchaser, whether a creditor or a third person paying full value, will be protected unless he participated in or was cognizant of the grantor's fraudulent and unlawful motives at the time the property was acquired: *Lehman v. Kelly*, 68 Ala. 192; *Roe v. Moore*, 35 N. J. Eq. 526; *Spring Lake Iron Co. v. Waters*, 50 Mich. 13.

KNOWN INSOLVENCY OF GRANTOR will not affect the validity of the conveyance when the grantee pays full value and has no notice of the intended fraud of the debtor, for it is well established that a third party may with a knowledge of the failing circumstances of a debtor buy property of him upon a fair consideration actually paid, unless he is aware that the debtor intended by the sale to defraud his creditors: *Albertoli v. Branham*, 80 Cal. 631; 13 Am. St. Rep. 200; *Olmstead v. Mattison*, 45 Mich. 617; *Massie v. Engart*, 32 Ark. 251; *Pochels v. Catonnet*, 40 La. Ann. 327; *Beasley v. Bray*, 98 N. C. 266. The purchase by one partner of his copartner's interest in firm property is not rendered void for fraud by the mere fact that the buyer has knowledge of his partner's insolvency when he has no reason to suppose that it is the intention of the latter to defraud his creditors by the sale: *Darland v. Rosencrans*, 56 Iowa, 122. It has been held, however, that the notorious insolvency of a grantor at the time he executes a deed to his son-in-law is evidence tending to show guilty participation on the part of the grantee in the fraud against the creditors: *Helms v. Green*, 105 N. C. 251; 18 Am. St. Rep. 893; *Washburn v. Huntington*, 78 Cal. 573.

RIGHT OF CREDITOR WITH KNOWLEDGE TO SECURE HIMSELF. — The rule is unquestionably settled that it is no objection to the validity of a conveyance by a debtor in failing circumstances to his creditor that it operates to hinder and delay other creditors, that it was made with an intent on the part of the debtor that it should so operate, and that the creditor receiving it was aware of that intent, provided he received it with the honest purpose of securing his debt; but if he acted from a desire to aid the debtor in defeating other creditors, or in covering up his property, or in giving him a secret interest therein, or in locking it up in any way for the debtor's own use and benefit, the conveyance will be held fraudulent and void: *Holmes v. Braidwood*, 82 Mo. 610; *Shelley v. Boothe*, 73 Me. 74; 39 Am. Rep. 481; *Brown v.*

Force, 7 B. Mon. 357; 46 Am. Dec. 519; *Brown v. Smith*, 7 B. Mon. 361; *Anderson v. Warner*, 5 Ill. App. 416. The rule is generally expressed to be that a creditor may receive payment of an honest debt in property of his insolvent debtor, although he may know at the time that the debtor's intent in making the payment is, and that the necessary effect of his act will be, to place the property beyond the reach of other creditors: *Levy v. Fiechl*, 65 Tex. 311; *Owens v. Clark*, 78 Tex. 547; *Knower v. Central Nat. Bank*, 124 N. Y. 552; 21 Am. St. Rep. 700; *Worland v. Kimberlin*, 6 B. Mon. 608; 44 Am. Dec. 785; *Schroeder v. Mason*, 25 Mo. App. 190; *Ross v. Sedgwick*, 69 Cal. 247. This rule may be illustrated as follows: A surety may buy property of his principal to protect himself or his suretyship, although the purchase may operate to hinder and delay creditors of the principal of their demands, and although the surety knew that the debtor intended the sale to have that effect, provided he did not participate in the fraudulent purpose of the debtor: *Albert v. Beesl*, 88 Mo. 150. Chattel-mortgage security is not invalidated by the mere fact that the creditor knows the debtor to be in failing circumstances and that the intended effect of taking such security will be to delay or defeat other creditors in the collection of their debts: *Olmstead v. Mattison*, 45 Mich. 617; *Chase v. Walters*, 28 Iowa, 460-469. In this case it was said: "When two or more *bona fide* creditors are engaged in a race for priority, the one securing it cannot have his right defeated and be postponed to a more tardy or less fortunate one by showing the fraudulent motive, and knowledge of it by the creditor, which prompted the debtor to give such priority. Fraud in its legal sense cannot without more be predicated upon such a transaction." A sale and conveyance of goods by a husband to his wife will not be held fraudulent as to his creditors, although accompanied by many badges of fraud and circumstances of suspicion and bad faith on his part, when the evidence fails to implicate his wife, or to charge her with notice of the husband's fraudulent intent. If a creditor purchases property from his debtor who is insolvent, and who the creditor knows is attempting to dispose of his property to defraud his creditors, the purchasing creditor must act in good faith, and pay or allow his debtor adequate prices or fair value for the property purchased: *Lewis v. Hughes*, 49 Kan. 23. But the purchasing creditor cannot go beyond the permissible purpose of securing his own debt, and in effecting this purpose must not unnecessarily hinder or delay other creditors, or impair their rights by placing it in the power of the debtor to effectually screen a part of the proceeds of the sale, when he has knowledge of facts sufficient to create a reasonable belief of such intention on the part of the debtor; and when his purchase is made partly in money and partly in an antecedent debt, the same rule is applicable as to third persons purchasing for a new consideration, and the payment of the past debt is only a circumstance to be considered in determining the good faith of the vendee in the transaction: *Levy v. Williams*, 79 Ala. 171; *Meyberg v. Jacobs*, 40 Mo. App. 128; *Black v. Vaughan*, 70 Tex. 47. When a creditor purchases a stock of goods of a failing debtor and in addition to the settlement of the claim due him from the debtor, pays the latter a part of the purchase price of the goods in money, with full knowledge of his insolvency and also of his intent to hinder and delay his other creditors from collecting claims due them from such debtor, the sale is void: *Davis v. McCarthy*, 40 Kan. 18; *Herman v. McKinney*, 47 Fed. Rep. 758. If in such case the creditor has no actual knowledge of the fraud, or the fraudulent design of his debtor, but the surrounding circumstances are such as would put a prudent man on inquiry, which if prosecuted diligently would dis-

close the fraud, he cannot be deemed a *bona fide* purchaser for value: *McDonald v. Gaunt*, 30 Kan. 693.

PARTICIPATION OR KNOWLEDGE BY THIRD PERSON PURCHASING. — The rule as to a third person purchasing from a debtor who intends by the sale to defraud his creditors, is, that, as between the purchaser and such creditors, actual knowledge by the former of the fraudulent intent of the debtor, or an active participation in such fraud, will avoid the sale at all events. Thus if a debtor sells his goods in order to defraud his creditors, and the vendee purchases in order to aid in the perpetration of the fraud, or has notice thereof, the sale is void as against creditors, no matter what price was paid, and regardless of the question of the transfer of possession: *Stone v. Spencer*, 77 Mo. 356; *McKinnon v. Reliance Lumber Co.*, 63 Tex. 30; *Weisger v. Chisholm*, 28 Tex. 780; *Eigenbrun v. Smith*, 98 N. C. 207; *Lane v. Starkey*, 15 Neb. 285; *Chaffee v. Gill*, 43 La. Ann. 1054; *Renninger v. Spatz*, 128 Pa. St. 525; 15 Am. St. Rep. 692; *Smith v. Collins*, 94 Ala. 394. In *Clements v. Moore*, 6 Wall. 299-312, the court said: "A sale may be void for bad faith, though the buyer pays the full value of the property bought. This is the consequence where his purpose is to aid the seller in perpetrating a fraud upon his creditors, and where he buys recklessly with guilty knowledge. When the fact of fraud is established, the buyer loses the property without reference to the amount or application of what he has paid, and he can have no relief either at law or in equity. When the vendor's object in making the sale is to defeat his creditors, three conditions must concur to protect the purchaser's title as against such creditors: 1. He must buy without notice of the fraudulent intent of the vendor; 2. He must be a purchaser for a valuable consideration; and 3. He must have paid the purchase money before he had notice of the fraud: *Cheek v. Waldron*, 39 Mo. App. 21; *McNichols v. Richter*, 13 Mo. App. 515; *Arnholt v. Hartwig*, 73 Mo. 485. If the vendee purchases at a grossly inadequate price, without actual notice of the fraudulent intent of his grantor, his title will not be protected as against the vendor's creditors: *Galbreath v. Cook*, 30 Ark. 417; especially when such transfer is between relatives or husband and wife: *Milner v. Davis*, 65 Iowa, 265; *Russ v. Bromberg*, 88 Ala. 619; *Lewis v. Linscott*, 37 Kan. 379. Thus a purchaser of an entire stock of goods, constituting the whole of the property of the debtor, for an inadequate price, must know, without anything else, that the effect of his purchase will be to hinder and delay, if not to defraud, the creditors of such debtor, and he is not a *bona fide* purchaser. He cannot close his eyes to the circumstances under which the debtor sells, and if he buys at a considerable discount, and the proposed means of payment must have the effect of delaying the seller's creditors, he will buy at his peril: *Beck v. Flynn*, 28 Neb. 575; 26 Am. St. Rep. 351. An assignment of wages to be earned in the future under an existing employment, if made as a device by the assignor to defraud his creditors, with notice to the assignee of that fact, is fraudulent and void, although a valuable consideration is paid: *O'Connor v. Meehan*, 47 Minn. 247. Participation by the grantee may be proved by any circumstances sufficient to charge his conscience with knowledge or notice of the fraudulent intent and design of the grantor: *Hoyt v. Turner*, 84 Ala. 523. The above rules regarding the transfer of personalty apply with equal force to the conveyance of real estate. Thus, when a vendor conveys real property with the intent of defrauding his creditors, and such fraudulent intent is participated in by the vendee, his title to the property will not be protected, although he paid a full and valuable consideration: *Chapel v. Clapp*, 29 Iowa, 191; *Perry v. Hardison*, 99 N. C. 21. The

transfer of such property must not only be upon a valuable consideration, but it must be *bona fide*; and even though the grantee pays a valuable, adequate, and full consideration, yet if the grantor sells for the purpose of defeating the claims of his creditors, and such grantee knowingly assists in effectuating such fraudulent intent, or even has notice thereof, he will be regarded as a participator in the fraud, and the conveyance will be deemed to be void: *Beidler v. Crane*, 135 Ill. 92; 25 Am. St. Rep. 349; *Bowyer v. Martin*, 27 W. Va. 442; *Young v. Ward*, 115 Ill. 264. The rule is especially strict when the conveyance is between relatives or husband and wife: *Peeler v. Peeler*, 109 N. C. 628. A sale of land made with intent to prevent the collection of counsel fees allowed the defendant in a divorce proceeding is fraudulent as to the attorney to whom such allowance has been assigned, when the vendee has knowledge of such intent at the time of the purchase although he purchased exclusively for his own use, and paid full consideration: *Garesche v. MacDonald*, 103 Mo. 1. Although the vendor at the time of the fraudulent conveyance retains sufficient property to pay all of his indebtedness, and the vendee pays the purchase money in full, yet if the conveyance is made with intent to defraud creditors, and this is known to and participated in by the vendee, the deed is void as to such creditors, if its enforcement would prejudice their interests: *Hudson v. Jordan*, 108 N. C. 10. And when the conveyance is made with a fraudulent intent, which is participated in by the grantee, it may be avoided as well by subsequent as by previous creditors: *Day v. Cooley*, 118 Mass. 524. When a mortgage is executed for the purpose of defrauding the mortgagor's creditors, and is taken by the mortgagee with knowledge of that purpose, and to aid its execution, it is void as to such creditors, although founded on a good and valuable consideration: *Moore v. Williamson*, 44 N. J. Eq. 496; *City Nat. Bank v. Goodrich*, 3 Col. 139.

KNOWLEDGE OF FACTS SUFFICIENT TO PUT ON INQUIRY. — If a transfer is made with intent on the part of the seller to hinder, delay, or defraud his creditors, and such intent is known to the purchaser, or could have been known from facts within his knowledge, and sufficient to put a prudent man on inquiry, and which by the use of ordinary diligence on his part would have led to a knowledge of the fraudulent intent of the seller, the sale or conveyance is fraudulent and void as to creditors, although a full consideration is paid: *Hough v. Dickinson*, 58 Mich. 89; *Bedford v. Penny*, 58 Mich. 424; *Dodd v. Gainer*, 82 Tex. 429; *Traylor v. Townsend*, 61 Tex. 144; *Blum v. Simpson*, 66 Tex. 84; 71 Tex. 628; *Mills v. Howeth*, 19 Tex. 257; 70 Am. Dec. 331; *Lyons v. Leaky*, 15 Or. 8; 3 Am. St. Rep. 133; *Tuteur v. Chase*, 66 Miss. 476; 14 Am. St. Rep. 577; *Williamson v. Wachenheim*, 58 Iowa, 277; *Jones v. Hetherington*, 45 Iowa, 681; *Bartles v. Gibson*, 17 Fed. Rep. 293; note to *Van Raalte v. Harrington*, 20 Am. St. Rep. 632, citing many cases; *Temple v. Smith*, 13 Neb. 513; *Bollman v. Lucas*, 22 Neb. 796; *Stix v. Keith*, 85 Ala. 465; *Smith v. Collins*, 94 Ala. 394. Actual knowledge by the vendee, according to the great majority of the cases, of the fraudulent intent of the vendor, is not essential to render the sale void, and when facts brought to his attention are of such character as to awaken suspicion, and lead a man of ordinary sagacity and prudence to make inquiry, he is chargeable with notice of the fraudulent intent, and with participation in the fraud. Of course, the sufficiency of the facts to arouse his suspicion and put him on inquiry is a question to be determined by the jury, under the peculiar circumstances of each case: *Gollob v. Martin*, 33 Kan. 252; *Kellogg v. Aherin*, 48 Iowa, 299; *Zimmerman v. Heinrichs*, 43 Iowa, 260; *Atwood v. Impson*, 20

N. J. Eq. 151; *David v. Birchard*, 53 Wis. 492-495; *Avery v. Johann*, 27 Wis. 246, 250; *Biddinger v. Wiland*, 67 Md. 359; *Hooser v. Hunt*, 65 Wis. 71; *Godfrey v. Miller*, 80 Cal. 420; *Merchant's Nat. Bank v. Northrup*, 22 N. J. Eq. 58; *Crafts v. Belden*, 99 Mass. 535; *Holcombe v. Ehrmanntraut*, 46 Minn. 397.

In determining the question whether or not the vendee had knowledge of the fraudulent intent of the vendor, the jury should take into consideration the acts and declarations of the respective parties, and all the facts and circumstances surrounding the sale or conveyance, and if the knowledge of the purchaser is sufficient to put him on inquiry, then the jury has the right to infer guilty knowledge on his part of the fraudulent character of the transaction: *Greenwell v. Nash*, 13 Nev. 287. "In cases of this nature, two facts are to be shown: 1. Fraud on the part of the vendor of the property in making the sale; and 2. Knowledge of such fraud on the part of the vendee or purchaser at the time of purchasing, or knowledge of such other facts and circumstances by the vendee as ought to have put him upon inquiry, and would have led to an ascertainment of the truth, or as will afford reasonable ground for the inference that he purposely or negligently omitted to make those inquiries which an ordinarily cautious and prudent man in the same situation would have made. Knowledge by the vendee of the fraudulent intent, or the existence within his knowledge of other facts and circumstances naturally and justly calculated to awaken suspicion of it in the mind of a man of ordinary care and prudence, thus making it his duty to pause and inquire, and a wrong on his part not to do so, before consummating the purchase, is essential in order to charge the vendee in every such case with a knowledge of facts so calculated to arouse suspicion that the vendee cannot shut his eyes, but must look about him and inquire": *Hopkins v. Langton*, 30 Wis. 379-381. "It is not, however, necessary in order to ascertain fraud, that direct affirmative or positive proof of fraud shall be produced. Concerning the actions of men, and especially when prompted by the secret, unexpressed, hidden motives of the actors, demonstration is certainly not attainable, nor is it required. As is the case with respect to knowledge on other matters, fraud may be inferred from facts that are established. It is enough if facts be established from which it would be impossible for the mind fairly and reasonably to conclude anything other than that there must have been fraud in the transaction": *Hickman v. Trout*, 83 Va. 478-490. "A person who deals in the avails of a scheme to defraud creditors, to keep what he gets, must not only pay for it, but he must be innocent of any purpose to further the fraud, even to protect himself. Actual notice need not be shown, if the purchaser has before him, at the time of his purchase, facts and circumstances from which a fraudulent intent, either past or present, on the part of the vendor, is a natural and legal inference, or such facts or circumstances of suspicion as would naturally prompt a prudent mind to further inquiry and examination, which if pursued, would lead necessarily to a discovery of the corrupting facts, he is chargeable with notice. A person who willfully closes his eyes toward seeing what he believes he would see if he kept them open, must be considered to have seen what any man with his eyes open would have seen": *De Witt v. Van Sickle*, 29 N. J. Eq. 209-215.

It is contended that to render a sale of goods void as to creditors and vendors, it must appear from the evidence not only that the intent to defraud his creditors by such sale existed in the mind of the vendor, but also that such intent was known to the vendee and participated in by him; that the court below erred in refusing to instruct as asked; and that the instruction

given was erroneous. But this is not true. To avoid a sale, actual notice to the purchaser of the fraudulent intent of the vendor is not necessary. If the facts and circumstances within his knowledge are sufficient to put a man of common sagacity upon inquiry, and with the use of reasonable diligence to lead him to the discovery of the fraudulent purpose of the vendor, and he neglects to make the inquiry, he will be charged with notice of the fraudulent intent. No purchaser put upon inquiry has a right to remain willfully ignorant of facts within his reach. It is not sufficient for his protection to show that he is a purchaser for value; he must also be an innocent purchaser. By aiding a debtor to convert his property into money or promissory notes, which can be easily concealed from his creditors and placed beyond his reach, with notice, actual or constructive, that he is doing so to defraud his creditors, he participates in the fraud of the debtor by assisting him in carrying out his fraudulent purpose": *Dyer v. Taylor*, 50 Ark. 314-320. When a mortgage is made with intent to defraud creditors, and the circumstances are such as should awaken the suspicion of the mortgagee and put him on inquiry as to the intent with which the mortgage is made, he will be charged with notice of that intent: *Moore v. Williamson*, 44 N. J. Eq. 496. As against this vast array of authority, cases from two states only are found which squarely maintain the opposite doctrine. One of these states is Missouri, from which the principal case is taken, and where the doctrine announced in that case may now be said to be firmly established, that in order to avoid a conveyance or transfer of property as fraudulent against creditors of the vendor, the vendee must have actual knowledge of the debtor's fraudulent intent, and must participate therein, and that constructive notice or a knowledge of facts which would put a prudent man on inquiry and lead to a discovery of the fraud, are not sufficient to charge him with notice thereof. In a prior Missouri case, *Van Raalte v. Harrington*, 101 Mo. 603, 20 Am. St. Rep. 629, the court held that when a vendee has paid a valuable consideration, and it is sought to avoid the sale because he has notice or knowledge of a fraudulent intent on the part of his vendor, the question to be submitted to the jury is whether or not he had actual notice or knowledge of the fraudulent purpose of the vendor, and not whether or not he had knowledge of facts which would put a prudent person on inquiry, which, if followed, would lead to a discovery of the fraud. The courts of New York maintain the same doctrine, namely, that to render a sale for a valuable consideration invalid as to creditors of the vendor, the purchaser must have actual knowledge or belief that the sale is being made to hinder or defraud such creditors; that no duty of active vigilance is cast upon the purchaser which requires him to suspect or investigate the motives of the seller, and fraud cannot be imputed to him from constructive notice; and that in charging the vendee with actual knowledge or notice of the fraudulent intent of the vendor, it may be inferred from the circumstances; but his mere negligence or want of diligence in not inquiring into facts known to him and calculated to put him upon inquiry is not sufficient to charge him with notice of the fraud. Hence the question to be submitted to the jury is whether or not the vendee did in fact know or believe that the vendor intended to defraud his creditors, and not whether or not he was negligent in failing to discover the fraudulent intent: *Stearns v. Gage*, 79 N. Y. 102; *Parker v. Conner*, 93 N. Y. 118; 45 Am. Rep. 178; *Bush v. Roberts*, 111 N. Y. 278; 7 Am. St. Rep. 741. The doctrine of these cases has met with severe condemnation in many instances, and the court expressly refused to follow them or approve the doctrine announced in *Hooser v. Hunt*, 65 Wis. 71-79. On the other hand, however,

the doctrine that when the title of a vendee is attacked on the ground of an intent on the part of the vendor to defraud his creditors by the sale or conveyance, it is necessary to avoid the transfer to show that the vendee had actual knowledge or belief that the vendor had such intent, and that although this belief may be inferred from the circumstances, it is not enough that the vendee had reason for the belief, if he did not in fact have it and it is not shown by the proof to have existed, has been adopted in *Knower v. Cadden etc. Co.*, 57 Conn. 202, and in *Seavy v. Dearborn*, 19 N. H. 351. Under the rule established by the great weight of authority, namely, that when the buyer has knowledge of facts and circumstances such as would put an ordinarily prudent man on inquiry, and which, by the exercise of reasonable diligence on his part, would lead to knowledge of the fraudulent intent of the vendor in making the sale, then such sale is fraudulent and void as to creditors of the vendor, the vendee must be in possession of facts sufficient to put him on inquiry, and need not heed mere suspicion of the vendor's intent not founded on any known facts, for a mere suspicion on the part of the purchaser that the grantor intends to defraud creditors by the sale is not sufficient to put the purchaser on inquiry or vitiate the sale: *Tuteur v. Chase*, 66 Miss. 476; 14 Am. St. Rep. 577; *Dodd v. Gaines*, 82 Tex. 429; *Merchants' Nat. Bank v. Northrup*, 22 N. J. Eq. 58.

PROOF OF KNOWLEDGE. — When a conveyance made by a debtor is attacked by his creditors as fraudulent, the burden of proof is first upon them to show the intent of grantor to defraud. This for the reason that fraud is never presumed, but must be proved: *Kipp v. Lamoreaux*, 81 Mich. 299; *Paul v. Baugh*, 85 Va. 955; *Nichols v. Bancroft*, 74 Mich. 191; *Tillman v. Heller*, 78 Tex. 597; 22 Am. St. Rep. 77; *Grimes v. Hill*, 15 Col. 359. When the fraudulent intent of the grantor is shown, the onus of proof shifts to the purchaser to show that he, in good faith, paid a valuable consideration: *Smith v. Collins*, 94 Ala. 394; *Tillman v. Heller*, 78 Tex. 597; 22 Am. St. Rep. 77; *Tredwell v. Graham*, 88 N. C. 209; *Thorington v. City Council of Montgomery*, 88 Ala. 548; *Hodges v. Hickey*, 67 Miss. 715. And when this is shown, the burden of proof again shifts to the attacking creditors to show that at the time of the transfer and payment of the purchase money, the purchaser participated in the fraud, had notice of the fraudulent intent of the grantor, or notice of such facts as should have put him on inquiry which, if followed, would have led to knowledge of such fraudulent intent: *Smith v. Collins*, 94 Ala. 394; *Tillman v. Heller*, 78 Tex. 597; 22 Am. St. Rep. 77; *Bastain v. Christesen*, 34 La. Ann. 883. The rule is thus laid down in *Crawford v. Neal*, 144 U. S. 585: The burden of setting aside a conveyance made by a debtor as being executed with intent to hinder, delay, or defraud creditors is on the attacking creditor; but when the fraudulent intent on the part of grantor is shown, and the circumstances are suspicious, then the purchaser must prove that he paid full value, and then the attacking creditor must make it appear that the purchaser had knowledge of the fraud at the time of the conveyance.

VOLUNTARY CONVEYANCES. — With respect to the grantee of a voluntary conveyance, as he has paid no consideration he has no equities equal or paramount to those of the pre-existing creditors of the grantor. His intent is therefore immaterial, and the conveyance to him must stand or fall according to the presumed intent of the grantor. The grantee cannot support the conveyance by showing his entire innocence or want of knowledge of the intent or circumstances of the grantor; note to *Hagerman v. Buchanan*, 14 Am. St. Rep. 748, citing many cases and treating the subject of voluntary

conveyances at considerable length. See also *Lyons v. Leaky*, 15 Or. 8; 3 Am. St. Rep. 133.

PURCHASER FROM FRAUDULENT GRANTEE. — A *bona fide* purchaser for value without notice from a fraudulent grantee takes a good title as against the creditors of the fraudulent grantor: *Zoeller v. Riley*, 100 N. Y. 102; 53 Am. Rep. 157; *Scheble v. Jordan*, 30 Kan. 353; *Neal v. Gregory*, 19 Fla. 356; *Mansfield v. Dyer*, 131 Mass. 200. A purchaser from a fraudulent grantee may, as against the creditors of the grantor, set up the defense of a *bona fide* purchase for a valuable consideration without notice when the deed is not fraudulent and void on its face; but if the deed is fraudulent on its face as against such creditors, the purchaser from the fraudulent grantee cannot claim protection: *Thames v. Rembert*, 63 Ala. 561. A purchaser from a fraudulent grantee who takes with notice of the fraud acquires the title subject to all the infirmities with which it was affected in the hands of such fraudulent grantee: *Wilcoxon v. Morgan*, 2 Col. 473; *Manhattan Co. v. Hvertson*, 6 Paige, 457.

A purchaser from a *bona fide* purchaser, although he has notice of the fraudulent intent of the original grantor, will generally take a good title as against such grantor's creditors: *Allison v. Hagan*, 12 Nev. 38; *Studabaker v. Langard*, 79 Ind. 320-325; *Fulton v. Woodman*, 54 Miss. 159. For example, when the grantee of real estate who is a purchaser for a valuable consideration and in good faith conveys such land to the wife of the fraudulent grantor, the wife takes title freed from the demands of her husband's creditors, although she has notice of the fraudulent intent of her husband, no money of such husband being put into the purchase: *Beane v. Neale*, 69 Ind. 148.

A fraudulent grantee who obtains property of a debtor with notice that the purpose of such debtor is to hinder, delay, or defraud his creditors, cannot be protected as against such creditors, and if he sells the property to a *bona fide* purchaser for value, he is liable to the creditors of the fraudulent grantor for the amount of consideration received from his grantee: *Smith v. Sands*, 17 Neb. 498; *Williamson v. Williams*, 11 Lea, 356; *Ferguson v. Hillman*, 55 Wis. 181.

WILLIAMS v. CHICAGO, SANTA FE, AND CALIFORNIA RAILWAY COMPANY.

[112 MISSOURI, 468.]

PRACTICE ON APPEAL — REVIEW OF ERROR. — The action of the court below in sustaining a motion to strike out part of a petition will not be reviewed on appeal unless assigned as error on the motion for a new trial.

CONSTRUCTION CONTRACTS — MEASUREMENTS OF ENGINEER, WHEN CONCLUSIVE AND BINDING. — A stipulation in a construction contract with a railway company that it shall be executed under the direction of the company's engineer, by whose measurements and calculations the amount of work performed shall be determined, and whose determination shall be final and conclusive, is valid and binding although the engineer is a stockholder in the company.

CONSTRUCTION CONTRACTS — CONCLUSIVENESS OF ENGINEER'S ESTIMATES — PLEADING. — In an action to recover for work performed under a construction contract which stipulates that it shall be executed under the direc-

tion of a certain engineer, by whose measurements the amount of work performed shall be determined, and whose determination shall be conclusive, the approval of the work by the engineer must be alleged and proved.

CONSTRUCTION CONTRACTS — ENGINEER'S ESTIMATES — PLEADING AND PROOF.

When in an action to recover for work done under a construction contract which stipulates that the amount of work performed shall be determined by the estimates of a certain engineer, and whose determination shall be conclusive, the complaint sets out the contract and alleges that the engineer, though often requested, failed to make the measurements as required therein, and to certify them, and that his failure so to do was fraudulent and collusive with defendant, and this is denied by answer setting out the final estimate of the engineer, which is alleged in reply to be made in violation of the contract, and fraudulent, the plaintiff must show that the engineer has refused to make an estimate as required by the contract, after demand, before he can introduce evidence under a *quantum meruit* count in his complaint of the amount and value of the work done; but he is not compelled to prove such refusal by the engineer himself, and may prove it by any witness who knows the facts.

CONSTRUCTION CONTRACTS — ENGINEER'S ESTIMATES — CONCLUSIVENESS OF — PLEADING AND PROOF.

— In an action to recover for work performed under a construction contract which stipulates that the amount of work done shall be determined by the measurements of a certain engineer, whose determination shall be conclusive, the plaintiff may, under a *quantum meruit* count in the complaint, show his compliance with the contract; that the engineer misconstrued it and failed to make the measurements as required by it; and he may also show the amount and value of the work done, notwithstanding an allegation in the answer that an estimate of measurements was made by the engineer.

CONSTRUCTION CONTRACTS — ENGINEER'S ESTIMATES — ATTACK ON FOR

FRAUD OR MISTAKE. — In an action to recover for work done under a construction contract which stipulates that the amount of work shall be determined by the measurements and certificate of a certain engineer, which shall be conclusive, such estimate and certificate may be impeached for fraud or gross mistake implying bad faith; otherwise they are conclusive, and so is his classification of material removed when this is left by the contract to his judgment, and no fraud is shown.

CONSTRUCTION CONTRACTS QUANTUM MERUIT — LIMIT OF RECOVERY.

— In an action on a *quantum meruit* to recover for work done under a construction contract, the plaintiff cannot recover more than the contract price.

CONSTRUCTION CONTRACTS — ENGINEER'S ESTIMATES — IMPEACHMENT OF FOR

FRAUD — INSUFFICIENCY OF PLEADING. — In an action to recover for work performed under a construction contract which provides that the amount of work done shall be determined by the measurements of a certain engineer, an allegation that the latter fraudulently failed to make or certify measurements as required by the contract, is insufficient to warrant the reception of evidence to impeach any measurement made by him, as it does not give any information as to the nature of the fraudulent acts relied upon, and the latter must be alleged as well as proved.

CONSTRUCTION CONTRACTS — RIGHT TO RECOVER AT LAW. — When a construction contract provides that the amount of work done thereunder

shall be determined by the measurements of a certain engineer, his estimates and award may be impeached for fraud or gross mistake in an action at law as well as by suit in equity, and on a *quantum meruit* the plaintiff may recover the value of the work done.

CONSTRUCTION CONTRACTS — LIEN UNDER AND AMENDMENT OF. — A contractor who has done work under a construction contract is entitled to one valid mechanic's lien for the work done, and if the first one filed is faulty and defective he may file another and perfect one within ninety days from the time the work is finished.

CONSTRUCTION CONTRACTS — MECHANIC'S LIEN — VALIDITY AGAINST ASSIGNER. — When a contractor who has performed work under a construction contract files a perfect mechanic's lien for the work done and materials furnished, as required by the statute within ninety days from the time the work is finished, such lien is valid, not only against the party with whom the contract was made, but also against its assignee who takes with notice and who assumes to pay its grantor's debts; nor will the fact that the contractor has accepted money due on his contract from the assignee affect the validity of the lien as against the assignor.

CONSTRUCTION CONTRACT — MECHANIC'S LIEN — FILING. — When during the progress of work under a construction contract, the party making the contract sells to another, and the latter assumes to pay its grantor's debts, the contractor need not file his lien for the work done within ninety days of the sale, but may file it within ninety days from the time the work is finished, and it will then be valid as against such grantee who takes with notice of the obligation.

Boyle, Adams, and McKeighan, and Berry and Thompson,
for the appellants.

Gardiner Lathrop and B. E. Guthrie, for the respondents.

GANTT, P. J. In the year 1887 the Chicago, Santa Fe, and California Railway Company of Iowa, a corporation of the state of Iowa, began the construction of a line of railroad from Kansas City, Missouri, through Missouri and Iowa to the Mississippi River, and the Chicago, Santa Fe, and California Railway Company, an Illinois corporation, began the construction of a railroad from the Mississippi River to Chicago in continuation of the other line. A. A. Robinson was second vice president and chief engineer of the Illinois company. B. F. Booker was chief engineer of the Iowa company.

On the 12th of January, 1887, the plaintiffs in this action entered into a written contract with the Iowa corporation to do the following work: "The grubbing, clearing, and grading, including the furnishing of materials as specified in said contract, to complete the roadbed and prepare the same ready for receiving the superstructure upon that portion of said railroad described in said contract as sections seventy-five to ninety-four, inclusive, in division three, which said sections

of said road commenced about three miles west of Grand River, in the county of Carroll, and terminated at the easterly end of said section one hundred and fourteen, in the county of Macon, running through parts of Carroll, Chariton, Linn, and Macon counties, in the state of Missouri."

Said contract contained, among others, the following provisions: "The work shall be executed under the direction and supervision of the chief engineer of said railway company and his assistants, by whose measurements and calculations the quantities and amounts of the several kinds of work performed under this contract shall be determined, and whose determination shall be conclusive upon the parties; and who shall have full power to reject or condemn all work or materials which in his or their opinion do not fully conform to the spirit of this agreement; and said chief engineer shall decide every question which can or may arise between the parties, relative to the execution thereof, and his decision shall be binding and final upon both parties. And, whereas the classification of excavation provided for in the annexed specifications is of a character that makes it necessary that special attention should be called to it, it is expressly agreed by the parties to this contract that the determination by the measurements and calculations of the said engineer of the respective quantities of such excavation shall be final and conclusive.

"The aforesaid party of the second part hereby agrees that whenever this contract shall be completely performed on the part of the said party of the first part, and the engineer has certified the same in writing, the said party of the second part shall, within ten days thereafter, pay to said party of the first part any remaining sums due for said work according to this contract.

"It is further agreed between the parties that monthly payments shall be made by the party of the second part, on the certificate of the engineer for work done, deducting ten per cent from the value of work done, as agreed compensation for damages, to be forever retained by the party of the second part, in case the whole amount of work herein named shall not be done in accordance with this agreement.

"For the purpose of avoiding all causes of difference or dispute between the parties to this contract, relative to its true intent or meaning, and for the purpose of adjusting in an amicable manner any difference that may or can arise relative

thereto, it is hereby mutually understood and agreed by the parties as follows, to wit: —

“1. No extra charges will be claimed or allowed on account of changes either in the line or grade of the road, the prices herein mentioned being considered as full compensation for the various kinds of work herein agreed to be performed.

“2. Whenever work is required to be done which is not now contemplated or covered by the prices herein mentioned, the engineer shall fix such prices for the work as he shall consider just and equitable, and the said parties shall abide by such prices; provided, the party of the first part enter upon and commence such work with full knowledge of the price so fixed by the engineer; but, if the party of the first part decline executing said work at the price fixed by the engineer, then the party of the second part may enter into contract with any person or persons for its execution, the same as if this contract had never existed; and if extra work, or work not provided for in this contract, is performed by the contractors without protest or notice in writing to the engineer, and to the party of the second part, before prices shall have been fixed to such work, then the engineer shall estimate the same at such prices as he shall deem just and reasonable, and his decision shall be final, and the party of the first part shall accept of such prices in full satisfaction of all demands against the party of the second part for said extra work. But nothing shall be deemed extra work that can be measured or estimated under the provisions of this contract.”

The specifications attached to said contract, and made a part thereof, contained, among others, the following provisions: “Loose rock shall comprise: 1. Shale of soapstone lying in its original or stratified position, coarse boulders in gravel, cemented gravel, hard pan, or any other material requiring the use of pick or bar, or which cannot be plowed with a strong ten-inch grading plow well handled, behind a good six-mule or horse team; 2. Detached rock or boulders in masses exceeding one and one half cubic feet and less than one cubic yard.

“Solid rock shall comprise: 1. Rock in solid beds or masses in its original or stratified position; 2. Boulders or detached masses of rock exceeding one cubic yard, and all other material which in the judgment of the engineer cannot be removed without being blasted.

“2. Measurement will be made by the cubic yard of twenty-

seven (27) cubic feet from true measured prisms indicated by the cross-section notes or slope stakes of the engineer.

"When measurement is made in embankment, an allowance for shrinkage will be used in making estimates as follows: Ten per cent on casting or shovel work, five per cent on scraper work, and seven per cent on wagon work. These percentages may be deducted from the true measured prisms, or the embankments may be required to be raised that much higher, at the discretion of the engineer."

The contract is set out in full in the petition. The plaintiffs entered upon the work of performing said contract on or about the seventh day of February, 1887, and completed the same on or about the nineteenth day of January, 1888.

On or about the fifteenth day of July, 1887, the said railway company of Iowa, executed and delivered to the said defendant, the Chicago, Santa Fe, and California Railway Company, a conveyance of all its road, its railway property, corporate rights and franchises, including said roadbed being constructed by appellants, and the said grantee company assumed and agreed to pay all the debts, and carry out and execute all the contracts, of the said grantor company. And the said grantee company took possession of the road, and the contract after that time was carried on under the direction and superintendence of the engineers of said company.

On the thirteenth day of March, 1888, plaintiffs filed a railway contractor's lien against the railroad in Missouri, in the office of the circuit clerk of Macon County, alleging that the work was completed December 19, 1888, and claiming a balance due of one hundred eighteen thousand, eight hundred seventy dollars. A copy of this lien was also filed in the office of the secretary of state within five days thereafter and a copy served on defendant. On the 19th of March, plaintiffs began their action to enforce their lien.

The final estimate of the chief engineer of the defendant, of all the work on this contract except section seventy-nine, was dated March 26, 1888; was received in the company's office in Chicago by the auditor April 12, 1888, and by the treasurer April 14, 1888. It showed a balance due of twenty-nine thousand four hundred twenty-seven dollars and eighty-nine cents. The final estimate on section seventy-nine was dated April 14, 1888; was received by the auditor July 26, 1888, and by the treasurer August 22, 1888, and showed a balance of nine hundred seventy-one dollars and seventeen

cents. The amount of work by this final estimate on section seventy-nine was the same as had been shown by the monthly estimate in February, 1888.

On the 16th of April, 1888, the plaintiffs filed a second lien in the circuit clerk's office in Macon County, stating that the work was completed January 19, 1888, and claiming a balance of one hundred eighty-eight thousand three hundred eleven dollars and seventy-five cents. A copy of this lien was also filed in the office of the secretary of state and served on defendant. On the 17th of June, 1888, this action was commenced to enforce this second lien.

The original petition set out the contract with the Iowa company; pleaded full performance of all its terms and conditions; stated the items of the various kinds of work claimed to have been done by them, showing a balance alleged to be due, after allowing all credits, of one hundred eighty-eight thousand three hundred eleven dollars and seventy-four cents; averred the sale of the railway property, corporate rights, and franchises of the Iowa company, including the roadbed being constructed by plaintiffs, to the Illinois company on the 15th of July, 1887; that said named company assumed and agreed to pay all the debts, and carry out and execute all the contracts of the Iowa company, including the contract with plaintiffs, and that said work under said contract after said date was directed and overseen by the Illinois company, its officers and engineer, in all respects as though said company had executed said contract in the first instance; set out the filing of the second lien on the sixteenth day of April, 1888, and made this further specific allegation:—

“Said plaintiffs state that said contract provides and provided for measurements by the chief engineer of said railway company of the work and labor done and materials furnished under said contract as a basis of payments to the said plaintiffs for the same, which, as these plaintiffs aver, contemplated and meant actual calculations and measurements by said engineer, to be made in good faith, and by the exercise of an honest judgment, and by competent engineer and assistants; yet, as these plaintiffs aver, said engineers of said railway companies, or the assistants and deputies of either of said companies, did not make of the greater part of said work any actual calculations and measurements of the said work and labor to determine classification of same done under contract,

but only approximate or percentage calculations and measurements as to classifications of work, and these calculations, measurements, and estimates which the said engineers of said railway companies did from time to time make, during and after the completion of said work, were made by said engineers and their assistants fraudulently, and in bad faith towards these plaintiffs, and were made by said chief engineer by willful, fraudulent, and wrongful and erroneous construction of said contract; and in making said calculations and measurements, said engineers and their assistants failed to exercise honest judgments, but, on the contrary, did make their said calculations and measurements fraudulently, with the intent and purpose of defrauding the plaintiffs out of their just rights, to the end that their employers, said railway companies, might wrongfully and fraudulently be benefited, to the injury of the plaintiffs, by the said wrongful and fraudulent misconduct, the said chief engineers, unknown to plaintiffs, being at the time, as these plaintiffs aver, stockholders, directors, and vice presidents of said Chicago, Santa Fe, and California Railway, and said railway company of Iowa, which was fraudulently concealed from plaintiffs by said railway companies and engineers when contract was made.

"Said plaintiffs state that the said pretended and fraudulent calculations and measurements of said engineers and their assistants of said railway companies, made during the progress of said work, and after its completion, in amount and value, were as follows:—

282,413.2 cubic yards earth embankment borrowed, at 16 cents per cubic yard.	\$ 61,136.11
152,160.6 cubic yards earth embankment borrowed, at 17 cents per cubic yard.	25,867.80
34,208.4 cubic yards earth excavations wasted, at 16 cents per cubic yard.	5,489.34
147,580.4 cubic yards excavation wasted, at 17 cents per cubic yard.	25,088.67
649,070.1 cubic yards earth excavation hauled, at 17 cents per cubic yard.	110,341.91
13,081 cubic yards loose rock, at 55 cents per cubic yard.	7,194.55
277,969.7 cubic yards loose rock, at 50 cents per cubic yard.	138,984.85
5,034 cubic yards solid rock, at \$1.05 per cubic yard.	5,286.33

21,260 cubic yards solid rock, at \$1.00 per cubic yard.	21,260.00
6,617,041.9 cubic yards, hauled 100 feet, at \$.012 per cubic yard.	79,474.50
238.6 acres of clearing, at \$30 per acre.	7,158.00
87.57 acres of grubbing, at \$130 per acre.	11,385.40
Extra work, with 15 per cent added.	9,120.87
Old rails furnished.	4,980.09
Total debits as per said calculations and measurements.	<u>\$512,747.42</u>

"The said railway companies have paid to plaintiffs, as heretofore stated, four hundred ninety thousand eight hundred ninety-four dollars and ninety-three cents, leaving only a balance according to the said fraudulent calculations, measurements, and estimates, due to the plaintiffs of twenty-one thousand eight hundred fifty-three dollars and forty-nine cents.

"Plaintiffs state that said engineers of either of said railway companies have not, although the said work and labor under said contract was complete on, to wit, the nineteenth day of January, A. D. 1888, and, although the said engineers have often been so requested by said plaintiffs, and although a reasonable time has long since elapsed, certified to plaintiffs, in writing, the completion of said work and labor, and the furnishing of materials by plaintiffs under said contract.

"Said plaintiffs state that they are ignorant whether or not said engineers of said railway companies or either of them have so certified, to said railway companies or one of them, in writing, to the completion of said work and labor, and materials furnished under said contract, but the belief of these plaintiffs is that they have not so certified, although a reasonable length of time has long since elapsed, but if such certificate has been made, it has been fraudulently concealed from these plaintiffs by said engineers and said railway companies.

"Said plaintiffs state that said acts and conduct of said engineers of said railway companies were fraudulently contrived and intended by said engineers and said railway companies conspiring together for the purpose of fraudulently and wrongfully preventing plaintiffs from obtaining, receiving, and collecting their said just demands against said railway companies, and from enforcing their said lien under the laws of Missouri."

The petition next averred the mortgage on the railroad

property, and prayed judgment against the Iowa company and the Illinois company for one hundred eighty-eight thousand three hundred eleven dollars and seventy-five cents, with interest thereon, and for the enforcement of a lien against the railway property. The petition contained a second count claiming the same amount to be due them upon *quantum meruit*.

On the sixteenth day of September, 1889, plaintiffs, by leave of court, amended their petition by striking out the following allegations of the petition: —

“Plaintiffs state that said engineers of either of said railway companies have not, although the said work and labor under said contract was completed on, to wit, the nineteenth day of January, A. D. 1888, and although the said engineers have often been so requested by said plaintiffs, and although a reasonable time has long since elapsed, certified to plaintiffs, in writing, the completion of said work and labor, and the furnishing of materials by plaintiffs under said contract. Said plaintiffs state that they are ignorant whether or not said engineers of said railway companies or either of them have so certified to said railway companies or one of them in writing to the completion of said work and labor and materials furnished under said contract, but the belief of this plaintiff is that they have not so certified, although a reasonable length of time has long since elapsed, but if such certificate has been made, it has been fraudulently concealed from these plaintiffs by said engineers and said railway companies,” — and inserting in lieu thereof the following: —

“Plaintiffs state that said engineers of either of said railway companies have not certified, although often requested so to do in writing, the completion of said work and labor and furnishing of materials set out herein, although at the date of the commencement of this suit a reasonable time had elapsed therefor after the completion thereof.

“On the contrary, said engineers refused to so certify said work, labor, and materials; which said failure and refusal of said engineers, these plaintiffs aver, were and are in bad faith, fraudulent, and collusive with said defendant railway companies.”

On the same day, upon motion of defendants, the plaintiffs excepting thereto, the court struck out of plaintiffs' petition the following matter: —

“Yet, as these plaintiffs aver, said engineers of said rail-

way companies, or the assistants and deputies of either of said companies, did not make of the greater part of said work any actual calculations and measurements of the said work and labor to determine classification of same done under said contract, but only approximate or percentage calculations and measurements as to classifications of work; and these calculations, measurements, and estimates which the said engineers of said railway companies did from time to time make during and after the completion of said work, were made by said engineers and their assistants fraudulently and in bad faith towards these plaintiffs, and were made by said chief engineer by willful, fraudulent, and erroneous construction of said contract; and in making said calculations and measurements, said engineers and their assistants failed to exercise honest judgments, but on the contrary, did make their said calculations and measurements fraudulently, with the intent and purpose of defrauding the plaintiffs out of their just rights, to the end that their employers, said railway companies, might wrongfully and fraudulently be benefitted to the injury of plaintiffs by said wrongful and fraudulent misconduct, the said chief engineers, unknown to plaintiffs, being at the time, as these plaintiffs aver, stockholders, directors, and vice presidents of said Chicago, Santa Fe, and California Railway and said railway company of Iowa, which was fraudulently concealed from plaintiffs by said railway companies and engineers when contract was made."

Thereupon the plaintiffs, by leave of court, made a second amendment to their petition by striking out the following portions thereof: All of the paragraph beginning: "Said plaintiffs state that the said pretended fraudulent calculations and measurements of said engineers and their assistants of said railway company, made during the progress of said work and after its completion, in amount and value were as follows,"—itemizing the debits as above set forth, and closing with the averment that the same amounted to five hundred twelve thousand seven hundred forty-seven dollars and forty-two cents, and the railway company had paid thereon four hundred ninety thousand eight hundred ninety-four dollars and ninety-three cents, leaving only a balance, according to said fraudulent calculations, measurements, and estimates, due to plaintiffs of twenty-one thousand eight hundred fifty-three dollars and forty-nine cents. And in lieu thereof made this allegation: "Said plaintiffs further

allege that although a reasonable length of time has long since elapsed, said chief engineer or his assistants did not during the progress of said work or since its completion make, as provided for in said contract, any measurements and calculations to determine the amounts and quantities of the several kinds of work performed under said contract. On the contrary, as these plaintiffs aver, said chief engineer and his assistants of both of said railway companies, although often requested so to do by these plaintiffs, refused during the progress of said work, and ever since its completion, to make the said measurements and calculations as provided and stipulated in said contract, which said refusal, neglect, and failure of said chief engineers and their said assistants were in bad faith and fraudulent and fraudulently collusive with said railway company.

"Said plaintiffs further state that said chief engineer of either of said railway companies did not, as provided and stipulated in said contract, during the progress of said work or since its completion, make any determination, by measurements and calculations, of the respective quantities of the different classes of work in the excavations made by plaintiffs under said contract; on the contrary, as these plaintiffs aver, said chief engineer during the progress of said work refused, and since the completion of the same has refused, neglected, and failed to determine, by measurements and calculations, the respective quantities of said excavations, as provided for in said contract, although a reasonable time had elapsed before the commencement of this suit, which said refusal, failure, and neglect of said chief engineer were fraudulent and in bad faith and in willful violation of the terms and conditions of said contract, and were collusively contrived with said railway company."

On the seventeenth day of September, 1889, defendants filed their answer to plaintiffs' second amended petition. The material parts of the answer are as follows: Paragraph one was a general denial of the petition except such as was expressly admitted; paragraph two admitted the execution and binding force of the contract set out in the petition and specifically pleaded the second paragraph of the contract, providing that the work should be done under the direction of the engineer, and that his decision should be final.

The answer then stated the provision of the contract for monthly payments to the plaintiffs, upon the certificate of the

engineer, for work done, deducting ten per cent, and alleged, "that the said engineer, during the progress of said work, did from month to month make running estimates and calculations of the amount of work done each month and the value thereof according to the terms, conditions, and prices of said contract and specifications, and did certify the same to the parties to said agreement, and the said defendant railway company paid the same to plaintiffs, which said payments plaintiffs then and there received and accepted under and in compliance with the terms of said contract." The answer then averred the making of a final estimate by the chief engineer of the railway company and his assistants of the work done by the plaintiffs, under their contract, upon the completion thereof, and within a reasonable time thereafter, in accordance with the terms and stipulations of said contract.

The eighth alleged the making of the monthly estimates, the prompt payment to plaintiffs on the same, the receipt of the moneys monthly, the advancement of large sums on the contract, and that plaintiffs knew how the estimates were made, and treated them as compliance with the contract, took the money thereon, and were estopped.

The ninth pleaded the stipulation in the contract that upon a performance of the contract the engineer should certify the same in writing, and in ten days thereafter the defendant should pay plaintiffs the sums remaining due according to the contract; alleged a full compliance by the engineer, a readiness to pay, and prayed that plaintiffs should be enjoined from further maintaining this action.

Plaintiffs filed a reply, denying that estimates were made according to contract, and to the third, fourth, fifth, sixth, and seventh defenses a general denial.

3. Averred that, although a reasonable length of time after the completion of the work had elapsed before the bringing of this suit, the chief engineer of either of said companies did not certify the same in writing, as provided in said contract, but on the contrary, although often requested by these plaintiffs so to do, failed and neglected so to do, and that said refusal, neglect, and failure were in bad faith, and by fraudulent collusion with said railway company.

The fourth, fifth, and sixth paragraphs of the reply were and are as follows:—

"4. Said plaintiffs admit that the contract set up in the

first count of their amended petition herein contains the clause referred to in the second defense of defendants' said answer, but plaintiffs aver that, although a reasonable length of time has elapsed, said chief engineer of either of said railway companies did not during the progress of said work or since its completion make, as provided for in said contract, any measurements and calculations to determine the amounts and quantities of the several kinds of work performed under said contract. On the contrary, as these plaintiffs aver, said chief engineer and his assistants of both of said railway companies, although often requested so to do by these plaintiffs, refused during the progress of said work, and ever since its completion, to make the said measurements and calculations, as provided and stipulated in said contract, which said refusal, neglect, and failure of said chief engineers and their said assistants were in bad faith and fraudulently collusive with said railway companies.

"Said plaintiffs further state that said chief engineer of either of said railway companies did not, as provided and stipulated in said contract, during the progress of said work or since its completion, make any determinations by measurements and calculations of the respective quantities of the different classes of work in the excavation made by the plaintiffs under said contract; on the contrary, as these plaintiffs aver, said chief engineer, during the progress of said work and since the completion of the same, has refused, neglected, and failed to determine by measurements and calculations the respective quantities of the different classes of work in said excavation, as provided for in said contract, although a reasonable length of time had elapsed before the commencement of this suit, which said refusal, failure, and neglect of said chief engineer were fraudulent and in bad faith, and in willful violation of the terms and conditions of said contract, and were collusively contrived with said railway company."

In the fifth paragraph of the reply, the plaintiffs allege that the estimates of the chief engineer and his assistants were all made in bad faith, and not in the exercise of honest judgments; were outside of and in violation of the powers conferred by the contract, and were fraudulently made by erroneous and arbitrary constructions of the contract and specifications with reference to the classification of material.

In the sixth and concluding paragraph of the reply plaintiffs averred want of notice from the chief engineer or his as-

sistants of their meeting and proceeding to make the final estimates of the quantities and amount of the several kinds of work performed under the contract, and want of opportunity to be present and be heard at any such meeting.

The cause was tried at the September term, 1889, and under the instructions of the court resulted in a verdict for plaintiffs for twenty-eight thousand five hundred eighty-four dollars and sixty-nine cents against the Chicago and Santa Fe Railway Company alone, and for the other defendants, and the jury found against the lien.

In due time plaintiffs filed their motion for a new trial, alleging the following grounds: 1. The court erred in rejecting testimony offered by the plaintiffs at the trial of the cause; 2. The court erred in admission of testimony offered by defendant; 3. The court erred in refusing to give instructions asked by plaintiffs; 4. The court erred in giving instructions asked by defendants. The court overruled this motion, and the plaintiffs appealed to this court.

1. The first assignment of error is based on the action of the circuit court in sustaining the motion of defendants to strike out a part of plaintiffs' petition; and it is earnestly urged that we should review this action of the trial court, notwithstanding no complaint thereof was made by the plaintiffs in their motion for a new trial.

We think the law is clearly against the contention of plaintiffs. It was their duty to give the trial court an opportunity to correct this error, if any, and, where this is not done, this court will not review the rulings of the lower court upon the point: *Acock v. Acock*, 57 Mo. 154; *Curtis v. Curtis*, 54 Mo. 351; *Lyon v. La Master*, 103 Mo. 612; *State v. Burckhardt*, 88 Mo. 430; *Bollinger v. Carrier*, 79 Mo. 318; *Exchange Nat. Bank v. Allen*, 68 Mo. 474; *State v. Gilmore*, 110 Mo. 1; *Kansas City etc. R'y Co. v. Carlisle*, 94 Mo. 166. And this ruling disposes of the other assignment that the court erred in refusing to strike out certain portions of the answer. This also was not made a ground of the motion for a new trial. We think there is a marked distinction between the cases of *O'Connor v. Koch*, 56 Mo. 253, and *Butler v. Lawson*, 72 Mo. 227, and similar cases, where the objection amounted to a demurrer to the whole case, and resulted in a dismissal of the cause, and cases like the one at bar, but it is unnecessary for us to discuss the rulings in those cases at this time. Moreover, plaintiffs by pleading over waived their right to review the action

of the court on this point: *Ely v. Porter*, 58 Mo. 158; *Gale v. Foss*, 47 Mo. 276; *Scovill v. Glasner*, 79 Mo. 449.

2. The plaintiffs, to sustain the averments of the first count in their petition, offered to prove at the trial that no measurements or calculations, although the work was capable of actual measurements, were made by the respondents' engineers, and that the work had been measured by plaintiffs' engineers, and was correctly stated in the petition, and that the defendants' engineers declared that they had not and would not measure the work, regardless of the specifications, and that the engineers were prejudiced against the plaintiffs and had misconstrued the contract as to classification. The circuit court rejected all this evidence.

To determine the correctness of this ruling, we must recur to the contract itself, ascertain the rights of the parties thereunder, and then see if under the pleadings this evidence was admissible. Now, by the contract, it was stipulated that, "the work shall be executed under the direction and supervision of the chief engineer of said railway and his assistants, by whose measurements and calculations the quantities and amounts of the several kinds of work performed under this contract shall be determined, and whose determination shall be conclusive upon the parties, and said chief engineer shall decide every question which can or may arise between the parties relative to the execution thereof, and his decision shall be binding and final upon both parties."

It should be further noted that plaintiffs complained that Mr. Robinson, the chief engineer, was an officer and stockholder of the defendant. It was also agreed that, when the contract was completed on the part of the plaintiffs, and the engineer had certified the same in writing, the railroad company should, within ten days thereafter, pay to the plaintiffs the sums remaining unpaid according to the contract. This stipulation in the contract that the engineers' estimate and classification should be final is valid and binding, and has the sanction of the courts in England and the different states of the Union and the federal courts: *Ranger v. Great Western R'y Co.*, 5 H. L. Cas. 88; *Herrick v. Belknap*, 27 Vt. 673; *Kidwell v. Baltimore etc. R. R. Co.*, 11 Gratt. 676-691; *Grant v. Savannah etc. R. R. Co.*, 51 Ga. 352; *Mansfield etc. R. R. Co. v. Veeder*, 17 Ohio, 396; *Sweet v. Morrison*, 116 N. Y. 19; 15 Am. St. Rep. 376; *Martinsburg etc. R. R. Co. v. March*, 114 U. S. 549.

By such a stipulation, the parties constitute the engineer an arbitrator, and the provision is held, if anything, more binding than an ordinary submission, for the reason that it enters into, and becomes a part of the consideration of, the contract, without which it would not in all probability have been made.

It has its origin in contracts for the building of important and extensive government works, and was designed to avoid harassing litigation over questions that can only be determined honestly by those possessed of scientific knowledge.

If parties are not allowed to make their own contracts, and stipulate to have their differences settled without a resort to litigation, many enterprises of vast importance and incalculable benefit to the public, must remain untouched: *Denver etc. Construction Co. v. Stout*, 8 Col. 61; *Snell v. Brown*, 71 Ill. 133.

And it is equally well settled that the fact that the chief engineer was also a stockholder does not of itself render the submission to him invalid. The argument made by the plaintiffs, that the duties confided to the engineer are essentially judicial, and being a stockholder himself he is thus made a judge in his own case, was met in the case of *Ranger v. Great Western R'y Co.*, 5 H. L. Cas. 88, where it was said: "This branch of the appellant's argument rests on the principle decided in this house, in the case of *Dimes v. Grand Junction Canal*, 3 H. L. Cas. 759, in which your lordship agreed with the able opinion delivered by the learned judges through Mr. Baron Parke, that the decision of a judge made in a cause in which he has an interest is voidable, unless in cases of necessity, as where an action was brought against all the judges of the court of common pleas, on a matter on which they had exclusive jurisdiction. But the question is whether it governs the present case. I think the principle has no application here; a judge ought to be, and is supposed to be, indifferent between the parties. He has, or is supposed to have, no bias inducing him to lean to the one side rather than to the other. . . . But here the whole tenor of the contract shows it was never intended that the engineer should be indifferent. . . . When it is stipulated that certain questions shall be decided by the engineer appointed by the company, this is, in fact, a stipulation that they shall be decided by the company. It is obvious that there never was any intention of leaving to third persons the decision of questions arising

during the progress of the work. The company reserved the decision to itself, acting, however, as from the nature of things it must act, by an agent, and that agent was, for this purpose, the engineer. His decisions were, in fact, those of the company. The contract did not hold out, or pretend to hold out, to the appellant, that he was to look to the engineer in any other character than as the impersonation of the company; in fact the contract treats his acts and the acts of the company, for many purposes, as equivalent, or rather identical. I am, therefore, of opinion that the principle on which the doctrine as to a judge rests wholly fails in its application to this case."

This decision has met the approval of the courts of this country: *Monongahela Nav. Co. v. Fenlon*, 4 Watts. & S. 205; *Faunce v. Burke*, 16 Pa. St. 469; 55 Am. Dec. 519; *Baltimore etc. R. R. Co. v. Polly*, 14 Gratt. 447; *Smith v. Boston etc. R. R. Co.*, 36 N. H. 458.

We can see no substantial difference between submitting the measurements and estimates to a paid agent and engineer, who is not a stockholder, and one who is. In either case, it is in law submitting to the company's own estimate and measurement.

Holding then that it was competent for the parties to make a contract containing this stipulation, let us next inquire as to the ground laid in the petition for this proposed evidence. By the contract, the engineer was required to make the measurements and estimates, and the obligation of the company was to pay ten days after the final estimate had been made by him, and the first count in the petition is based on the contract. In *Dinsmore v. Livingston Co.*, 60 Mo. 241, this court held that, "where parties agree to abide by the decision or opinion of an architect, engineer, or commission of any kind, in regard to the correspondence of the work done with the contract, in an action on such contract the approval of the person selected by both parties to determine this must be averred and proved. If the disapproval or rejection of the work arises from caprice or malice, and is really without foundation, such facts may be alleged and a recovery still be had in equity: 2 Story on Equity, 1457 a, 1457 b; *Herrick v. Belknap*, 27 Vt. 673; *Neenan v. Donoghue*, 50 Mo. 495; *Yeats v. Ballentine*, 56 Mo. 531."

There is no allegation that the balance claimed in the first count was the amount due as found by the chief engineer. *Prima facie*, then, it is insufficient for want of this averment.

And, recognizing this cardinal rule in pleading, learned counsel, to avoid this objection, aver that the engineer did not make the measurements as required by the contract, though often requested so to do, and did not at its completion make a determination of the respective quantities of the work, and his failure and neglect so to do was fraudulent, in bad faith, and collusive with the defendant company. Of course, if the engineer made no measurement and estimate, plaintiffs would not be debarred of redress, and this count, in so far as it accounts for the pleader's failure to aver that the balance he claims is due by the estimate of the engineer, must be held good pleading: *Martinsburg etc. R. R. Co. v. March*, 114 U. S. 549; *Rude v. Mitchell*, 97 Mo. 365; *Dinsmore v. Livingston Co.*, 60 Mo. 241; *Neenan v. Donoghue*, 50 Mo. 495; *Yeats v. Ballentine*, 56 Mo. 531.

The answer denied this, and set forth at length what defendant claimed was the final estimate. In the fifth paragraph of their reply plaintiffs inferentially admit there was an estimate made by the chief engineer, but allege it was made in bad faith, was outside of and in violation of the contract, fraudulent, and collusive, particularly as to earth, loose rock, and solid rock.

When the cause came on for hearing, the circuit court ruled that, under this state of pleading, before plaintiffs could introduce evidence of the amount and value of the work done by them, they must first show that the engineer had refused to make an estimate and certificate as required by the contract, after demand upon him by the plaintiffs. This ruling is challenged, and the learned counsel for plaintiffs contend that they had a right to show that the engineers did not make a correct measurement, and did not properly classify the material, and wholly misconstrued the contract as to the classification of loose rock and hard pan.

We think the circuit court correctly ruled that the pleadings on the first count tendered the issue of estimate or no estimate, certificate or no certificate, and that this must first be determined.

The certificate of the balance due by the chief engineer was a prerequisite to the sustaining of an action on this contract, in the first instance, and before the estimates and measurements of other engineers are admissible, in an action seeking the benefits of this contract, the circuit court was right in ruling that it must first be shown that the chief en-

gineer had not certified the amount due, as the parties had agreed he should, or had not made the calculation or measurements as required by the contract. Plaintiffs were not required to go into the enemy's camp, however, and prove this by the company's engineer. Any other competent witness who knew the facts could testify to this failure.

8. Now while it is perfectly clear that, in a suit on the contract, this was necessary before they could go into the measurements made by engineers, not named in the contract, it is urged upon us that plaintiffs had a right, under their second count of *quantum meruit*, to recover the value of their work and materials.

At common law, a party could sue in *assumpsit* to recover the stipulated price due on special contract where the contract had been fully executed, and nothing remained to be done but the payment of the agreed price: *Mansur v. Botts*, 80 Mo. 651; *Chesapeake etc. Canal Co. v. Knapp*, 9 Pet. 565; *Dermott v. Jones*, 2 Wall. 9. In such a case he does not repudiate the contract, nor seek to avoid it, but, under his common count of *quantum meruit*, he offers the contract in evidence to sustain his case, and his proof of compliance with its terms. Nor does this necessarily work injustice, as might at first appear.

In this case, the plaintiffs have performed certain work under a written contract. That contract specifies the compensation they shall receive for the various kinds of work, but there is a stipulation that a certain engineer shall estimate the amount of this work, and give a certificate, and this shall fix the total price plaintiffs shall receive.

Now it is clear that if, through neglect or fault of the engineer or the party who employed him, this estimate was not made, or through caprice or fraud he refused to make it, no one will say plaintiffs shall not have their reward because of his default, and yet, looking at the letter of the contract alone, they would be remediless. Accordingly, while it is true that, if a party makes a contract, he must abide by it before he can recover on it, and if an approval by an outside party is made a condition precedent in an action on the contract, such an approval must be alleged and proved, yet, where this is wrongfully or unavoidably withheld, the courts have never refused redress, and this is the firmly settled law in this state and in this court: *Neenan v. Donoghue*, 50 Mo. 495.

When he proceeds to make his case, he offers the contract, the foundation of his claim, and then offers to show that the chosen umpire or arbitrator has failed to make his estimate. If the engineer has failed, no one will doubt the propriety of permitting him to show by other legitimate evidence his compliance with his contract and the value of his labor. This plaintiffs offered to do here, and were denied the right, because the defendants in their answer averred the engineer had made the estimate. In this the circuit court erred. Plaintiffs had a right under either count in their petition to show the amount of their work and labor, and were not precluded from so doing merely because defendants had pleaded the estimate and certificate. That was a matter of defense at this stage of the trial. The contract fixed the prices. Moreover, plaintiffs were entitled to show, if they could, under either count, that the engineer misconstrued the contract in his classification of the loose-rock clause, and had not measured the work according to contract. An allegation of fraud was not necessary to entitle them to this evidence at this time.

Plaintiffs claimed and offered to show that the engineer construed hard pan to be loose rock only, "when it could not be plowed with a strong ten-inch plow, behind a good six mule or horse team." Plaintiffs insisted, that under this clause, the contract itself fixed the classification of hard pan as loose rock without reference to the plowing test. We think the plaintiffs are correct in their interpretation of this clause, and if the engineer did so misconstrue it, he exceeded the power vested in him by the contract, and there is no principle of law or equity that demands that plaintiffs should submit to a misconstruction of their contract which would result in serious loss to them.

The contract fixed certain classifications of material, others it left to the judgment of the engineer. The engineer's measurement, in the absence of fraud, or such gross mistake as necessarily to imply bad faith, is binding and conclusive, and his classification of material, where it is left to his judgment, is final and conclusive in the absence of fraud, but under a proper construction of this contract, the parties had not submitted to him the question of how hard pan was to be classified. They fixed that for themselves. It is the province of the courts to construe contracts, and the plaintiffs had a right to the construction of the court on this clause: *King Iron*

Bridge etc. Co. v. St. Louis, 43 Fed. Rep. 768; *Lewis v. Chicago etc R'y Co.*, 49 Fed. Rep. 708.

That there will be great diversity of opinion as to what is hard pan, we think is highly probable, but the parties to this contract assumed it was well known. It was the province of the engineer to say what was hard pan, and how much hard-pan there was excavated, but he was bound to classify hard-pan as loose rock, and had no right to decline to so grade it, because it could be moved with a ten-inch plow and six mule team. Of course, if it shall appear on the trial that the engineer did not misconstrue the contract in this respect, then his measurements are binding and conclusive, in this as well as in other respects, until impeached for fraud.

Having held that plaintiffs under the allegations of their petition could show the amount and value of their labor not exceeding the contract price, the question necessarily arises, what effect is to be given the contract in such a case? We answer that the contract must still control. It fixes the prices, and in certain cases the classification, and provides the engineer shall determine the others. While parties have been allowed to sue in *assumpsit* where there was a special contract, this court has invariably ruled that the contractor cannot recover beyond the contract price, less the damages, if any, occasioned by his failure to fully comply with his contract. If upon trial, the defendants show to the satisfaction of the jury that an estimate was made as required by the contract, and certificate of the balance given by the engineer to plaintiffs, within a reasonable time, the court will instruct the jury that this is final and conclusive as to all matters submitted to him for his measurement, classification, and calculation, in the absence of fraud or gross mistake, but as to materials not submitted to his classification, it must appear that he has measured and estimated them according to the classification fixed by the parties in the contract.

So far we have discussed the admissibility of the evidence without reference to the charge of fraud. Fraud vitiates everything. While the courts with great unanimity sustain stipulations providing that the work shall be done under the direction and supervision of the engineer, and his estimate shall be final and conclusive upon the parties to the contract, they have also concurred in saying that the engineer's estimate may be assailed for fraud, gross errors, or mistake: *Martinsburg etc. R. R. Co. v. March*, 114 U. S. 549; *Sweet v.*

Morrison, 116 N. Y. 19; 15 Am. St. Rep. 376; *Brush v. Fisher*, 70 Mich. 469; 14 Am. St. Rep. 510; *Perkins v. Giles*, 50 N. Y. 228.

In the original petition filed in this cause, there were general allegations of fraud to the effect that the chief engineer and his assistants made a fraudulent construction of the contract, and made their calculations fraudulently. These allegations were stricken out on motion, and no complaint was made on this ground in the motion for a new trial, and as before said, cannot be reviewed on that account.

In the amended petition on which the cause was heard, there is an allegation that the engineer, though often requested, did not measure the work, but fraudulently, and in bad faith, and in collusion with the company, refused to do so, and did not make and return his estimates as required by the contract. It seems very plain that the charge of fraud here goes to the refusal to measure and make the estimate, not to the making of measurements and estimates in a fraudulent manner, or outside of and in disregard of the contract, and it would seem clear that such an averment would only enable the plaintiffs to dispense with the averment and proof of the condition precedent, upon which they were authorized to sue, and was not such a charge of fraud in the manner of making and returning estimates as would permit evidence to impeach an estimate actually made, certified, and returned, but erroneously estimated and calculated. The sufficiency of a charge of fraud under our code system has been adjudicated by this court, and it has been held that, "it is not enough to charge that a party has fraudulently procured, or fraudulently did this or that, or committed fraud." "These allegations are but conclusions of law; the facts constituting the fraud must be stated": Bliss on Code Pleading, 211; *Smith v. Sims*, 77 Mo. 269-274; *Reed v. Bott*, 100 Mo. 62; *Hoester v. Sammelmann*, 101 Mo. 619; *Mateer v. Missouri Pac. R'y Co.*, 105 Mo. 320.

Without any averment, then, that the measurement and calculations were made, and without the statement of any facts showing these measurements were in fact made and certified, but fraudulently made, the plaintiffs sought to show that the method adopted by the engineers in estimating the work was not correct. But they do not point out in their pleading wherein the engineers went outside of the contract, nor in what their bad faith consisted, nor wherein they failed to ex-

ercise honest judgments, nor what arbitrary construction they made of the contract or its specifications. As a basis for correcting the errors made in the measurements and estimates of this work by the engineers, if any were made, this petition does not charge fraud or gross error in such a way as to inform the court or the opposite party of the nature of the fraudulent acts, and on this ground the court committed no error in declining to hear the evidence as on an issue of fraud or mistake. Plaintiff sought to cure this defect by the reply. There are several reasons why the reply does not justify evidence of fraud, though it tendered the issue of no measurement or certificate within a reasonable time, and a misconstruction of the contract in the classification of materials.

It is sufficient to say that it contains no statement of facts constituting fraud. It is clear that a reply of fraud in general terms was sufficient at common law, and indeed was held sufficient in the petition or other pleading after the adoption of the code, but since the decisions in *Smith v. Sims*, 77 Mo. 269, and *Reed v. Bott*, 100 Mo. 62, and *Hoester v. Sammelmann*, 101 Mo. 619, it would seem that something more is required, and the facts should be stated. These later decisions, we think, are more in harmony with our code system, and in conflict with the earlier adjudications: Bliss on Code Pleading, sec. 339, note 1.

It is urged with great ability and upon the most respectable authority elsewhere that the award made by the engineer has the validity of awards by other arbitrators, and can only be impeached in a court of equity. Counsel also rely upon the expression in the opinion of Judge Napton, in *Dinsmore v. Livingston Co.*, 60 Mo. 241, that, "if the disapproval or rejection of the work arises from caprice or malice, and is really without foundation, such facts may be alleged and a recovery be had in equity." That relief might be had in a court of equity upon appropriate charges of fraud and gross mistake we have no doubt, but to hold that the jurisdiction is exclusive would be to deny the courts of law a jurisdiction long exercised and firmly rooted.

In *Martinsburg etc. R. R. Co. v. March*, 114 U. S. 549, the suit was an action at law to recover a balance due on a contract for work and labor done on a railroad, containing a stipulation identical in principle with the one in the contract in this cause. It was not even suggested that the action had not been brought in the proper forum, or that a court of law

was inadequate to give relief. There, as here, the declaration contained two counts. To the first count, relying specially upon the contract, a demurrer was sustained in the supreme court of the United States, because there was no averment that the engineer had been guilty of fraud or gross mistake in his estimates, and holding that in the absence of such an allegation, plaintiff could not go behind the certificate of the engineer, but clearly holding that with such averments the plaintiff might proceed in a court of law. But even in that case there was no question raised as to the common count of *indebitatus assumpsit*. See also *Chicago etc. R. R. Co. v. Price*, 138 U. S. 185. Here the action is on the contract in the first count, alleging a breach of its stipulations by defendants, and in the second count upon a *quantum meruit*.

In *Yeats v. Ballentine*, 56 Mo. 537, this court held that an action at law could be maintained, notwithstanding the plaintiff himself had violated his contract. The doctrine of that case has been repeatedly approved, and we do not feel at liberty to question it at this day: *Rude v. Mitchell*, 97 Mo. 365.

Upon the issues tendered, the plaintiffs could not be required to call the engineer as a condition precedent to establishing their case before the jury. It was said in *Rude v. Mitchell*, 97 Mo. 365: "On such an issue the estimate of the architect would be of no more value than that of any other competent witness." And to the same effect is *Yeats v. Ballentine*, 56 Mo. 530.

4. At the conclusion of the cause the court gave peremptory instructions to the jury, by which they were required to find against the plaintiffs' right to a lien for the balance of twenty-eight thousand five hundred eighty-four dollars and sixty nine cents admitted to be due them. The court evidently gave this instruction because it considered that plaintiffs had exhausted their right to a lien when they filed their first account on March 13, 1888, and this action having been brought on the lien filed April 16, 1889, plaintiffs had no right to enforce it. This involves a construction of our statutes giving a lien to contractors, material men, and laborers on railroads: Rev. Stats. 1879, c. 47, art. 4. This is a purely statutory lien. To entitle any contractor to this lien, he is required, within ninety days after the completion of the work, to file in the office of the circuit clerk of any county through which the railroad is located a just and true account of the amount due after all just credits have been given, which account shall

state the amount claimed as due, the general nature of the work, amount of labor performed or of materials furnished; the dates when the work was done and materials furnished; the place or places at which said labor was done or materials furnished; the name or names of the parties with whom the contract for the work and material was made, and the name of the railroad against which the lien is to apply.

Action must be brought on this lien in ninety days, or it ceases: Rev. Stats. 1879, sec. 3205. This lien becomes an encumbrance from the date of the commencement of such work and labor, and is prior to all other mortgages and encumbrances.

The question now arises, if a contractor or other person, in attempting to avail himself of this provision of the law, fails to file such a statement of his claim as will give him this lien, may he within the time specified in the statute file a correct and sufficient statement, and thus entitle himself to the benefit of the statute, or is he cut off by his first futile attempt?

In *Mulloy v. Lawrence*, 31 Mo. 583, this court held the plaintiff could have but one lien, but in *Davis v. Schuler*, 38 Mo. 24, it was explained that this meant one good and valid lien, and when the first paper filed was inoperative as a lien, the claimant might file another within the time prescribed. This last ruling is most certainly in accord with the spirit of the statute and common sense.

The question then arises in this case, was the lien of March 13, 1888, valid? If so, the plaintiffs have exhausted their right, and the court correctly decided against them. The original lien filed March 13th could not be found, and the notice and the record were read as the next best evidence. The "account was for balance due for construction of a part of the railroad of said Ray County from February 7th to December 19, 1887, under a contract dated at Topeka, January 12, 1887, with the Chicago, Santa Fe, and California Railway Company of Iowa, in construction of roadbed through sections seventy-five to ninety-four, division two, and sections ninety-five to one hundred and fourteen, division three, running through parts of Chariton, Linn, and Macon counties, consisting of grading, scraping, cleaning, plowing, excavating of roadbed and ditching, piping and other work on said sections and section one hundred and fifteen:—

Amount of labor performed	\$604,784.84
Amount paid on said work	485,914.84
Lien claimed on roadbed of said C. S. F. & C. R'y	
Co. for salary	118,870.11

It is evident this would not support an action for a lien. As said in *Rude v. Mitchell*, 97 Mo. 365: "When the statute calls for a just and true account, it means a fairly itemized account showing what the materials are, the work that was done and the price charged, so that it can be seen from the face of the account that the law gives a lien therefor. . . . A lumping item of the whole contract price on the one hand and the credits on the other is no compliance with the law at all."

And this brings us to an examination of the second lien, of April 16, 1888. This lien specifies the different kinds of work, the quantities, cubic yards of earth, embankments borrowed, and price; the total amount of cubic yards of earth excavation with the price and amount; the amount of loose rock, price, and amount; the amount of cleaning, grubbing, ditching, and hauling, separately, placing of iron culverts, and different items of extra work, giving in detail credits and the balance due. Under this account and the evidence tending to show that the last work was done on the 19th of January, 1888, we think the trial court erred in holding that the second lien was void, and in giving a peremptory instruction to that effect, and refusing plaintiffs' instructions numbers three and four, and refusing their instruction number eleven.

The position taken in the brief of respondents, that the lien was lost because the Iowa company sold out to the Illinois company and assumed the obligation of paying plaintiffs for their work under the contract, and plaintiffs did not, within ninety days after that sale, file their lien, is not tenable. The plaintiffs had a contract to do this work; the company had a right to assign the contract, and its assignee could assume to pay plaintiffs, but by so doing they could not destroy plaintiffs' rights.

The case is wholly unlike *Allen v. Frumet Mining etc. Co.*, 78 Mo. 688, and *O'Connor v. Current Riv. R. R. Co.*, 111 Mo. 185. In those cases there were different parties doing the work under different contracts, and it was held each must file his own lien; here all the work was done by one firm, under one contract, and there was no release of the original com-

pany, notwithstanding the Illinois company assumed the payment for the work. The contract will support the lien as against the Iowa company, and all who take the property with notice of the obligation. We think this is too plain for argument.

It also follows that the circuit court erred in its first instruction, that under the evidence the jury must find for all the defendants except the Illinois company.

The conveyance by the Iowa company to the Illinois company did not release the former from its personal obligations to plaintiffs on the contract. The mere acceptance of the money, due them on their work from the grantee of the company, did not work a release of the Iowa company. There is no evidence beyond the notice of the money due on their contract that they had agreed to release the Iowa company and accept the Illinois company in their stead. They prayed judgment against all, and were entitled to a personal judgment against the Iowa company and a lien as against all the others, if the court had granted their declarations of law and the jury, under those instructions, had found for them.

The judgment is reversed, and the cause remanded for a new trial, in accordance with the views herein expressed. If plaintiffs desire to tender the issue of fraud, they should have leave to amend their petition and state the facts constituting the fraud or gross error of which they complain in their briefs in this court.

RAILROAD CONSTRUCTION CONTRACTS — INTERPRETATION OF. — Provisions in such contracts making the chief engineer of the road umpire to decide matters growing out of the contract between the parties, are valid and binding, and his decision of any matter within his authority upon matters under the contract is conclusive upon the parties in the absence of fraud or bad faith: *Langdon v. Northfield*, 42 Minn. 464; *Sweet v. Morrison*, 116 N. Y. 19; 15 Am. St. Rep. 376, and note; *Faunes v. Burke*, 16 Pa. St. 469; 55 Am. Dec. 519, and note with cases collected. See also note to *Commercial etc. Ass. Co. v. Hocking*, 2 Am. St. Rep. 567.

QUANTUM MERUIT — AMOUNT OF RECOVERY ON. — Where one has done work under contract entered into under a mistake of the parties thereto, he is entitled to recover reasonable compensation therefor, though in excess of the price named in the contract: *Rowland v. New York etc. R. R. Co.*, 61 Conn. 103; 29 Am. St. Rep. 175. See note to *Craig v. Van Bebb*, 18 Am. St. Rep. 621; extended note to *Hayward v. Leonard*, 19 Am. Dec. 272; note to *Merrill v. Ithaca etc. R. R. Co.*, 30 Am. Dec. 142, where the amount that can be recovered under a *quantum meruit* count is discussed.

MECHANIC'S LIEN — ASSIGNABILITY OF. — This question is discussed in *Mills v. La Verne Land Co.*, 97 Cal. 254; 33 Am. St. Rep. 168, and note.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

DUNSTAN v. HIGGINS.

[128 NEW YORK, 70.]

A FOREIGN JUDGMENT IS CONCLUSIVE upon the merits, and can be impeached only by proving that the court rendering it did not have jurisdiction of the subject-matter of the action or of the person of the defendant, or that it was procured by fraud.

FOREIGN JUDGMENTS. — THE REFUSAL OF A FOREIGN COURT TO ALLOW A COMMISSION to examine witnesses in this state does not affect the conclusive character of a judgment subsequently rendered by such court.

JURISDICTION OF FOREIGN COURTS. — When a party is sued in a foreign country upon a contract made there, he is subject to the procedure of the court in which the action is pending, and must resort to it for the purposes of his defense, if he has any, and any error committed must be reviewed and corrected in the usual way. So long as he has the benefit of such rules and regulations as have been adopted and are in use for the ordinary administration of justice among the citizens and subjects of the country, he cannot complain, and justice is not denied him.

A FOREIGN JUDGMENT IS SUFFICIENTLY AUTHENTICATED when the attestation certifies that the papers are true copies of the records filed in the office of the court, and legally kept in the custody of the masters thereof. It is not indispensable that the certificate state that the copy had been compared by the clerk with the original, and is a correct transcript therefrom, and of the whole of the original.

ACTION upon a judgment of the high court of justice of England, queen's bench division. The authentication of the record was as follows:—

“I certify that the foregoing are true copies of the records filed in the central office of the supreme court of judicature in England, and legally kept in the custody of the masters of the said court.

"Dated this twenty-second day of January, 1891.

"FRANCIS A. STRINGER,

"Head clerk in the writ, appearance, and judgment department central office.

"This is to certify that the above, Francis A. Stringer, is the officer in charge of the documents filed in the central office of the supreme court, on which file are the documents of which the above are certified to be true copies, and that he is the proper officer to testify to the correctness of such copies.

"Dated this twenty-second day of January, 1891.

"GEORGE POLLOCK,

"One of the masters of the supreme court of judicature, having the superintendence and control of the central office of the court.

"I, the Right Honorable John, Duke, Baron Coleridge, lord chief justice of England, hereby certify that the above, George Pollock, is a master of the high court, and one of the legal custodians of the records of such court, and that the above signature, George Pollock, is in the proper handwriting of the said master.

COLERIDGE, L. C. J.

"[Seal of the supreme court of judicature, England.]

"I, the Right Honorable Stanley, Baron Halsbury, lord high chancellor of Great Britain, keeper of the great seal thereof, do hereby certify that the within signature, 'Coleridge, L. C. J.,' is of the proper handwriting of the Right Honorable John, Duke, Baron Coleridge, lord chief justice of England, the president of the queen's bench division of the supreme court of judicature, and that the said court is duly constituted, and has jurisdiction in all actions, matters, and proceedings in the said division.

"In witness whereof, I have hereunto set my hand and caused the great seal to be affixed at Westminster, this tenth day of February, 1891.

HALSBURY, C.

"[Great seal.]"

Judgment for the plaintiff.

O. C. Higgins and F. S. Smith, for the appellant.

Ten Eyck and Remington, for the respondent.

O'BRIEN, J. The plaintiff recovered in an action upon a judgment in his favor and against the defendant, rendered in 1890 by the supreme court of judicature in England. It

appears that the plaintiff, in pursuance of an agreement, manufactured and shipped at London to the defendant at New York an omnibus and Beaufort cart at a price agreed upon. Suit was brought upon the account by the plaintiff against the defendant in England, and personal service of process was made upon him there, and jurisdiction obtained by the court of the person of the defendant and the subject-matter of the action. The defendant appeared and interposed for defense, in substance, that the articles were manufactured and shipped under a special contract, by which the price and the character and quality of the articles were particularly specified, and that the goods, when received by the defendant, did not conform to the agreement, but were practically worthless to him. The plaintiff denied that there was any agreement to manufacture such vehicles as the defendant claimed, and asserted that the articles delivered conformed in all respects to the defendant's order. While the action was at issue in England the defendant applied to the court for a commission to examine witnesses in this country to prove the allegations of his answer. This application was denied; upon what ground or for what reason does not appear. The defendant did not appear for trial, and the court ordered judgment against him, and for defense to this judgment in our courts he has interposed substantially the same facts, and insists that it is unjust and unfair, and that as he was not permitted to produce his proofs at the trial in England, he is not now bound by the judgment. He also applied to the courts here in this action for a commission to examine witnesses in England, which application was refused, and upon the trial the court held that the foreign judgment was conclusive, and that the plaintiff was entitled to recover. The general term has affirmed the judgment, and also the order refusing the commission, and the appeal to this court is from both determinations. It is the settled law of this state that a foreign judgment is conclusive upon the merits. It can be impeached only by proof that the court in which it was rendered had not jurisdiction of the subject-matter of the action or of the person of the defendant, or that it was procured by means of fraud: *Lazier v. Westcott*, 26 N. Y. 146; 82 Am. Dec. 404.

The judgments of the courts of a sister state are entitled to full faith and credit in the courts of the other states under the constitution of the United States, but effect is given to the judgments of the courts of foreign countries by the comity of

nations which is part of our municipal law. The refusal of the foreign court to allow a commission to examine witnesses here does not affect the conclusive character of the judgment. Such applications are generally within the discretion of the court to which they are addressed and then a refusal to grant them does not constitute even a legal error subject to review. But even if it appeared in this case, as it does not, that some legal right of the defendant was denied in refusing the application that would not affect the validity or conclusive nature of the judgment, so long as it stood unreversed and not set aside. Legal errors committed upon the trial or during the progress of the cause may be corrected by appeal or motion to the proper court, but they furnish no defense to an action upon the judgment itself. Where a party is sued in a foreign country, upon a contract made there, he is subject to the procedure of the court in which the action is pending, and must resort to it for the purpose of his defense, if he has any, and any error committed must be reviewed or corrected in the usual way. So long as he has the benefit of such rules and regulations as have been adopted or are in use for the ordinary administration of justice among the citizens or subjects of the country he cannot complain, and justice is not denied to him. The presumption is that the rights and liability of the defendant have been determined according to the law and procedure of the country where the judgment was rendered, and there is nothing in the record to the contrary. The questions of fact or law settled by this judgment could not be re-examined in our courts. The judgment was properly authenticated and established at the trial under the provisions of the code. The order of our courts refusing the commission to examine witnesses in England was, so far as appears, a matter of discretion. As the foreign judgment was conclusive, the facts stated in the answer were not admissible as proof upon the trial, and therefore it is clear that no legal right of the defendant was violated by the denial of his application.

The judgment should be affirmed, and the appeal from the order dismissed.

All concur, except GRAY, J., not voting.

FOREIGN JUDGMENTS, CONCLUSIVENESS OF: See notes to *Messier v. Amery*, 1 Am. Dec. 324-326; *Lazier v. Westcott*, 82 Am. Dec. 412-414. A foreign court will be presumed to have the necessary jurisdiction of the parties and

subject-matter when the certificate to the record of the judgment rendered by it indicates on its face that it is a court of record: *Coughran v. Gilman*, 81 Iowa, 442; *Reed v. Boyd*, 13 Tex. 241; 65 Am. Dec. 61; *Shumway v. Stillman*, 4 Cow. 292; 15 Am. Dec. 374; *Buffum v. Stimpson*, 5 Allen, 591; 81 Am. Dec. 767; and therefore it does not devolve upon a party producing a foreign judgment, as for example a decree of divorce, which is apparently regular, to prove affirmatively the jurisdiction of the court from which it emanates: *James v. James*, 81 Tex. 372. The *onus probandi* lies on him who seeks to impeach the credit of such a judgment: *Scott v. Coleman*, 5 Litt. 349; 15 Am. Dec. 71.

AUTHENTICATION OF FOREIGN JUDGMENTS: See notes to *Taylor v. Barron*, 64 Am. Dec. 290, and *Lesier v. Westcott*, 82 Am. Dec. 411-414.

DOUGLASS v. FERRIS.

[128 NEW YORK, 192.]

A GUARDIAN'S SURETIES ARE NOT RELEASED by a settlement made by him with his ward after the latter comes of age, and a decree entered thereon by the surrogate adjudging that the guardian had fully accounted, if such settlement was procured by fraud and misrepresentation, and it and the decree are subsequently annulled in an action brought for that purpose against such guardian. The effect of the annulment was to make the settlement and decree void *ab initio*, and of no more legal effect than if they had never existed.

A JUDGMENT AGAINST A GUARDIAN IS CONCLUSIVE UPON HIS SURETIES where it annuls the settlement made by him with his ward, and fixes the amount of his liability to such ward, if the condition of their bond was that the guardian, "should well and faithfully discharge his duties, and render a just and true account of all moneys and property received by him, and of the application thereof, and of such guardian in all respects to and before any court having cognizance thereof when thereunto required."

JURISDICTION TO SETTLE ACCOUNTS OF GUARDIANS. — If a guardian has by fraud settled his accounts with his ward, and procured a decree from the surrogate court discharging him from liability, and such ward finds it necessary to resort to a court of equity to set aside such settlement and decree on account of such fraud, the court has jurisdiction not only for the purpose of setting aside the settlement and decree, but also to determine the amount due upon an honest accounting; and its judgment fixing such amount is conclusive upon the sureties of the guardian in the absence of fraud and collusion.

SURETIES OF GUARDIAN, LACHES IN PROCEEDING AGAINST. — Mere indulgence by a ward of his guardian after coming of age, without any valid agreement for delay or the extension of time, does not affect the obligation of the sureties, nor are such sureties released by any agreement procured from the ward through fraud, and which he, on discovering the fraud, resists and procures to be annulled.

SURETIES, DECEASE OF ONE OF SEVERAL. — The estate of a deceased surety upon a guardian's bond, joint and several in form, remains liable after his death.

SURETIES OF GUARDIAN, WHEN LIABLE FOR COSTS. — If an action is brought against a guardian to settle his accounts, and a judgment is entered therein for the amount found due and for costs of suit, the sureties are liable for such costs; but if there was never any issue as to the amount of the guardian's liability, and the suit was to set aside a settlement with the ward procured by the fraud of the guardian, the sureties, not being instrumental in the settlement, are not chargeable with the costs incurred in procuring its annulment.

Richard L. Hand, for the appellants.

Royal Corbin, for the respondent.

O'BRIEN, J. The general question presented by this appeal is the liability of the defendants to the plaintiff upon a bond given on the 29th of March, 1872, to the plaintiff, who was then a minor, to secure the faithful performance by Edwin B. Low, his general guardian appointed on that day, of the duties of his trust. The plaintiff arrived at the age of twenty-one years on the 26th of March, 1879, and it appears that on the 14th of the following May the guardian had in his hands four thousand three hundred sixty-three dollars and ten cents to which the plaintiff was entitled. On that day, as the findings show, the guardian and his brother, who was insolvent, approached the plaintiff with a view to a settlement and discharge of the obligation. They presented the brother's note for three thousand two hundred dollars, payable to the order of the plaintiff, and bearing date March 31, 1879, at two years, with semi-annual interest, and also a mortgage purporting to secure the payment of the sum for which the note was given and running to the plaintiff, covering two hundred acres of land in the state of Illinois. The guardian, for the purpose of inducing the plaintiff to settle his claim for the amount of the note, as secured, fraudulently represented to the plaintiff that the lands embraced in the mortgage were cultivated and valuable improved farm lands, and worth at least ten thousand dollars, and ample security for the payment of the sum for which the note was given. The plaintiff was ignorant of the facts touching the solvency of the maker of the note and the value of the land and the sufficiency of the security, but relied entirely upon the representations of the guardian. In fact the lands were uncultivated swamp lands, not worth to exceed seven hundred dollars, all of which was known to the guardian at the time of making the representations. The plaintiff believing the statements to be true was induced to settle his claim for the note and security

and to give to the guardian a receipt in full for the three thousand two hundred dollars, and also a paper purporting to discharge him from his trust and authorizing an attorney named to appear before the surrogate and declare the account of the guardian settled and to procure him to be formally discharged. The attorney and the guardian on the twelfth day of January, 1880, appeared before the surrogate and the account was stated, and the guardian credited with the payment of the balance in his hands, namely, four thousand three hundred sixty dollars and thirty-two cents, and, thereupon, the surrogate entered a decree whereby it was adjudged that the guardian had fully accounted for all moneys of his ward that came to his hands, and that nothing remained in his hands that was due to the plaintiff.

The plaintiff was ignorant of the facts constituting the fraud thus practiced upon him until about the month of November, 1880, when he immediately communicated his information to the guardian, and demanded that the settlement receipt, power of attorney, decree of the surrogate and discharge be rescinded and treated as void, to which demand the guardian assented and promised to pay the amount of the claim to the plaintiff, but failed to do so except the sum of eight hundred dollars, which was paid about the month of February, 1882. It has also been found that the plaintiff, at all times since the discovery of the fraud, has been ready and willing to restore what he received from the guardian on the settlement, and that before the commencement of any suit, he executed and tendered to the guardian an assignment of the mortgage and the note and a satisfaction thereof, and these papers have been ready for delivery since October, 1882, when he commenced an action in the supreme court against the guardian as such. The object of that action was to procure a judgment annulling the decree of the surrogate and the settlement papers upon which it was based, and declaring the account between the plaintiff and his said guardian to be unadjusted and the sum of three thousand two hundred dollars unaccounted for. The complaint contained suitable allegations of all the facts upon which to base the relief. The only pleading which the guardian served in the action was a demurrer which, upon a hearing, was overruled and judgment was ordered in favor of the plaintiff for the relief demanded with costs, which judgment was to be absolute unless the defendant answered over as he was permitted to do by the judg-

ment. It was entered on the sixteenth day of February, 1885, and adjudged, among other things, that there was still due to the plaintiff from the guardian the sum of three thousand five hundred seven dollars and twenty-four cents, which included interest on the sum of three thousand two hundred dollars from March 31, 1879, less the payment made before mentioned. Service of a copy of the judgment was made upon the defendant's attorneys on the day of its entry. The defendant therein then appealed to the general term where it was affirmed and judgment of affirmance and for costs entered June 9, 1885, which was made absolute in form upon proof that the defendant had failed to answer or pay costs as permitted by the special term. Executions were issued upon these judgments and returned wholly unsatisfied. Then the present action was commenced, October 31, 1885, against the sureties upon the guardian's bond, by the service of the summons and complaint, on that day, upon the sureties Gilletta Low, Rodney Sargent, and Peter Ferris. The first named answered separately, by the same attorneys representing the guardian in the former suit, that she was a married woman when she executed the bond, and the action, as against her, was discontinued by stipulation, but she was not released. The other sureties answered by the learned counsel who argued the case at bar in this court, or by his firm, and after the case was at issue and ready for trial in 1886, they were substituted as attorneys in the old suit against the guardian and appealed to this court from that judgment.

The new attorneys then had control of both cases, and in June, 1886, they made a motion to the court at special term in both actions. The object of these motions was first to permit the appeal to the court of appeals in the old action to be prosecuted without further security and to stay all proceedings in this action, without security, pending that appeal. This motion was granted upon a showing in support of the application, apparently that the plaintiff already had security in the guardian's bond and that the appeal to this court from the judgment in the old suit conclusively determined the liability of the sureties on that bond. In October, 1887, this court affirmed the judgment (*Douglass v. Low*, 107 N. Y. 628) without an opinion. In the meantime and on the 28th of January, 1887, Sargent, defendant, and one of the sureties died, leaving a will, in which the defendant, Abbey A. Prouty, was named as sole executrix, to whom letters testamentary

were issued. This action was revived as against her by a supplemental complaint which was answered by both defendants and these pleadings present the issues in the case. On the trial the plaintiff gave in evidence the bond, the judgment roll in the action against the guardian, and the judgments of affirmance at general term and in this court, and the executions issued and returned unsatisfied and rested. Substantially the only proof given by the defendants was to show that the sureties had no knowledge of the settlement between the plaintiff and the guardian, or of any of the fraudulent acts or proceedings before referred to, until the month of October, 1885, and also some proof relating to the financial responsibility of the guardian during a part of that time. The court found all the facts, the substance of which is herein stated, and other facts not necessary to refer to, and found according to the defendant's contention that they were ignorant of the settlement or of the proceedings until the time stated, and further, that up to April, 1882, the guardian was the owner of a valuable piece of unencumbered real estate in the county, the actual value of which was not shown, and which he conveyed at that date, and has been insolvent since January 27, 1885. He held as matter of law that the judgment in the first action was *prima facie*, binding upon the defendants and evidence against them of the facts therein adjudged, and that they were liable for the amount of that judgment and the costs with interest thereon.

The condition of the defendant's obligation was that the guardian "shall well and faithfully in all things discharge the duty of guardian to the above-named minor according to law, and render a just and true account of all moneys and property received by him, and of the application thereof and of such guardian in all respects to and before any court having cognizance thereof when thereunto required."

To insure the performance of this trust the sureties bound themselves in the penalty of the bond, "and each of us, our and each of our heirs, executors and administrators, and each and every of them, jointly and severally, firmly, by these presents." The principal questions discussed by the learned counsel for the defendant on this appeal are: 1. That the sureties have been discharged by the settlement between the plaintiff and the guardian and the extension of time involved therein, and; 2. In consequence of the plaintiff's omission to notify them at an earlier day of the situation or to pro-

ceed against the guardian. It was competent for the plaintiff, after he became of age, to settle with his guardian, and if the settlement had been fairly and honestly and not fraudulently made, it would discharge the guardian and his sureties: *Kirby v. Taylor*, 6 Johns. Ch. 242.

But in this case the settlement and the papers executed by the plaintiff to the guardian, as well as the decree of the surrogate based thereon, were vitiated by fraud and had no effect upon the plaintiff's rights. It is true that he was the only one that could complain of the fraud, or could elect to repudiate the transaction, and until such time as he did the transaction was binding. But when he made that election and brought an action to annul the transaction, and the court declared it void, the effect of the election and judgment was to make it void *ab initio*, and of no more effect or legal significance than if it had never occurred. So that, in truth, there was no settlement or release of the guardian, and no binding or valid extension of time for the payment of the moneys in his hands by the plaintiff.

Upon principle and authority there cannot, I think, be any doubt that if the guardian had accounted before the surrogate in the usual way, and a decree had been entered, free from fraud, adjudging that he owed the plaintiff a designated sum, that decree would have bound the sureties. This is upon the principle that by their contract they are privy to the proceedings against their principal, and when he is concluded they, in the absence of fraud or collusion, are concluded also: *Dougllass v. Howland*, 24 Wend. 35; *Jackson v. Griswold*, 4 Hill, 522; *Annett v. Terry*, 35 N. Y. 256; *Baggott v. Boulger*, 2 Duer, 160; *Rockfeller v. Donnelly*, 8 Cow. 637; *Girvin v. Hickman*, 21 Hun, 816; *Casoni v. Jerome*, 58 N. Y. 815; *Harrison v. Clark*, 87 N. Y. 575; *Thayer v. Clark*, 48 Barb. 243; 41 N. Y. 620; 4 Abb. Ct. App. Dec. 391; *Herman on Estoppel*, etc., 173, 174; *Dodge v. St. John*, 96 N. Y. 260; *Methodist Church v. Barker*, 18 N. Y. 463.

The plaintiff was obliged to bring an action to set aside the decree of the surrogate, which operated to discharge the guardian, and also to set aside the fraudulent transaction upon which this decree was based. He could not have obtained this relief in the surrogate's court, and the supreme court having obtained jurisdiction for this purpose could and did retain the whole case, not only for the purpose of setting aside the fraudulent settlement and decree, but also of determining the

amount due to the plaintiff upon an honest accounting: *Hood v. Hood*, 85 N. Y. 561; *Haight v. Brisbin*, 100 N. Y. 219; *Perkins v. Stimmel*, 114 N. Y. 859; 11 Am. St. Rep. 659; *Stilwell v. Mills*, 19 Johns. 304; *Sanders v. Soutter*, 126 N. Y. 193.

The duty of the guardian, guaranteed by his sureties, was to account, before any court of competent jurisdiction, for the money or property that came to his hands by virtue of the trust, and as the supreme court had such jurisdiction, its judgment against the guardian had at least the same force and effect as the decree of the surrogate would have had. The sureties, by their contract, had so connected themselves with the obligations of the guardian, and with the proceedings to bring him to an account, and with the judgment rendered, that it bound them, as well as the guardian, as to all questions necessarily involved. The judgment could be impeached for want of jurisdiction, or for fraud or collusion, but in all other respects it became conclusive as evidence or by way of estoppel. The plaintiff could not have succeeded in his action against the guardian to annul the settlement and decree, without showing that he had rescinded, any more than he can now succeed against the sureties without establishing the same fact. But the judgment in the former action adjudged that the transaction had been rescinded, and this concludes the defendants also.

In regard to the question of laches, it is true that an omission to promptly repudiate and rescind a settlement of this character, by the ward, and long acquiescence by him in what was done, with knowledge of all the facts, would furnish a good defense to the sureties. But so it would to the guardian, and the judgment against him has determined conclusively that there was no want of diligence in this respect on the part of the plaintiff in demanding rescission and tendering back what he had received. That question was necessarily an issue in the former action, and so far as it was, the defendants are concluded, though they may not be as to questions that did not concern the guardian's defense. But it is conceivable that sureties, under such circumstances, might have relied, to their prejudice, upon the decree of the surrogate, and an omission to attack that in time was a defense that may not have been involved in the former action, and was probably open to the defendants on the trial of this action, but the case is relieved from any difficulty on that point by the stipulation of counsel and the finding of the court that the defendants, up

to the time of the commencement of this action, did not know of the existence of that decree, and consequently, could not have acted upon the faith of it, or have been misled or lulled into security by it.

It must be conceded that the judgment against the guardian conclusively established at least the existence of the debt to the ward, and when the plaintiff had proved the execution of the bond, and that the remedies against the guardian had been exhausted by the return of an execution on the judgment unsatisfied, he had made out his case. It was not necessary to the maintenance of the action to establish any other fact determined by the former judgment. It became necessary, then, for the defendant to show some defense, and they gave no proof except with respect to the two facts already mentioned. In this view, the judgment was more important to the defendants than to the plaintiff, for unless the facts upon which they rely for a defense are thereby established, they are not established at all. Without the judgment the court could not know that there ever had been a settlement induced by fraud, a discharge of the guardian, or a decree of the surrogate adjudging, virtually, that the guardian had performed his trust, but all of which was based upon fraud. Indeed, if the judgment is to be discarded as evidence for or against these defendants, except so far as it proves the amount due to the ward, then it is perfectly clear that no defense whatever has been made out or even attempted. In order to give the defendants any standing at all, they must have the benefit of all the facts determined in the suit against the guardian, for they are not otherwise established; but the defendant cannot use that judgment as proof of facts in their favor, and upon which they rely, and at the same time reject the legal result of these facts as expressed in or necessarily implied from the decision. They are really in the attitude here of insisting that the judgment is conclusive in this action as to the facts but not as to the law. It was determined in that action that the plaintiff had rescinded and repudiated the transaction upon which the decree of the surrogate was based, and that he had acted with reasonable promptness and diligence whether that was a fact or a legal conclusion, and the defendants must, if they claim the benefit of any part of the record, take the whole of it.

Moreover, it is apparent from the record and the course of the trial that the question of laches now urged in this court

as a ground for the reversal of the judgment constituted no part of the original plan of defense. It is predicated wholly upon a fact established only by the judgment roll in the suit against the guardian, given in evidence by the plaintiff, namely, that the plaintiff delayed the action against the guardian from the time of the discovery of the fraud, in November, 1880, till October, 1882.

But no such defense was interposed or suggested by the answer. The only defenses set up are: 1. The decree of the surrogate; 2. That the fraud was the personal act of the guardian, for which the sureties were not responsible; 3. That the plaintiff extended the time of the guardian to pay for two years by taking the note without the consent of the sureties, who were released thereby; 4. That the plaintiff, after he became of age, settled with the guardian, and released him; 5. That the plaintiff elected to treat the bond as joint, by bringing an action against all the sureties. The answer contains no allegation that the plaintiff was chargeable with any laches in delaying to prosecute the guardian, and they cannot now avail themselves of a defense not pleaded, though the facts upon which it is based may appear in the record. It is not every fact that appears in the record that a party can have the benefit of in this court, but only such facts as have been pleaded and proven. *Secundum allegata et probata* is the rule that governs in such cases.

But apart from these considerations, and entirely independent of the question of the effect of the former judgment, it would be difficult to hold upon the facts upon which the defendant's argument is based, that the plaintiff is chargeable with such laches as operate to relieve the sureties. He did not discover the fraud until November, 1880, and then he immediately communicated the information to the guardian and demanded that the transaction be rescinded, and offered to restore what he had received under it, and the guardian promised to comply with this demand and to pay the claim, and in February, 1882, actually did pay a portion of it. The relation of guardian and ward is one of trust and confidence and, under the circumstances, it cannot, we think, be affirmed as matter of law that the ward is chargeable with want of diligence because he acted upon the faith of the guardian's promise, and did not commence his action until October, 1882. After that date the delay is chargeable to the dilatory nature of the defenses interposed by the act of the defendants them-

selves and their principal. Nor can the plaintiff under the circumstances be charged with any omission of duty in not notifying the sureties. They could not remain passive during all this time, and then when called upon to respond impute laches to the plaintiff. They owed to him a more active duty than he did to them. They had virtually assured him by their contract that his guardian would be faithful to his trust and that he would not perpetrate a fraud upon him. Under such circumstances, if there was any duty to use active vigilance, it was imposed upon the sureties themselves rather than upon the ward. They had agreed to be responsible to him, not with reference to any fixed or computable period of time, but for all time until the guardian had accounted or paid and the relations completely terminated. In the case of guarantees for the collection of notes and such obligations, and other contracts of indemnity, the holder can know with certainty when the debt is due or when there is a breach of the contract secured. The rule of diligence that governs in such cases cannot be applied here at least with the same strictness. But even in that class of cases it is only when but one inference can be legitimately drawn from the facts that reasonable diligence becomes a question of law. If, on the contrary, different inferences may be fairly drawn by equally intelligent and unbiased minds, the question is one of fact: *Salt Springs Nat. Bank v. Sloan*, 185 N. Y. 371; *Chatham Nat. Bank v. Pratt*, 135 N. Y. 423.

If the doctrine of laches could be applied to the relations that exist between the plaintiff and the defendant to the same extent as to that class of obligations just referred to, a proposition which may well be doubted, still the judgment could not be disturbed against the findings of the learned trial court.

The argument of the learned counsel for the defendant seems to me to rest wholly upon the proposition that by mere delay to proceed against the guardian from November, 1880, to October, 1882, the sureties were relieved. I do not understand that delay alone on the part of the ward, after he becomes of age, to proceed against the guardian for accounting will discharge the sureties upon his bond. Of course, the ward, after he becomes of age, may so deal with him as to disable himself from proceeding, and then in a proper case the sureties could complain. But so long as the ward does not make a binding agreement for the extension of time, and does not preclude himself in any way from instituting the

proper proceeding against the guardian, mere delay will not affect the obligation of the sureties on the bond, providing the right to proceed is not barred by the statute of limitations. If he institutes the proper proceeding within the time allowed by law, neither the guardian nor his sureties can defeat it by alleging that he has waited too long. In this case, had no fraud been perpetrated upon the ward, he could have waited and left the property in the hands of his guardian without relieving him or his sureties. The law did not require him to proceed within any particular period of time except that designated in the statute of limitations. Mere indulgence by the plaintiff of the guardian, without any valid agreement for delay or the extension of time, does not affect the obligation of the surety: *Powers v. Silberstein*, 108 N. Y. 169; *Hurd v. Callahan*, 9 Abb. N. C. 374; *Daniels v. Patterson*, 3 N. Y. 47; *McKecknie v. Ward*, 58 N. Y. 541; 17 Am. Rep. 281; *Howe Machine Co. v. Farrington*, 82 N. Y. 121; *Lowman v. Yates*, 37 N. Y. 604; *Hunt v. Purdy*, 82 N. Y. 486; 37 Am. Rep. 587; *Steinbock v. Evans*, 122 N. Y. 551.

When the creditor refuses or neglects to proceed against the principal, after requested so to do by the sureties, this rule is modified, but that distinction has no application to this case, as no such request was ever made. Hence the only ground of complaint that defendants can urge upon this appeal is the mere indulgence or delay to prosecute on the part of the plaintiff, and that is not a defense.

The facts of this case do not furnish any sufficient ground upon which the plaintiff can be deprived of the benefit of this rule. He was induced by fraud to settle with his guardian, and when he discovered the fraud he promptly repudiated the transaction, and called upon the guardian to account or pay. This the guardian promised to do, and while we may assume that such promise had some effect upon the plaintiff's mind, yet he did nothing whatever to tie his hands or bind himself to wait a single moment. He could have proceeded at once against the guardian, but how did the delay in bringing the action affect the sureties any more than it would if no fraud had been committed? When the plaintiff rescinded the fraudulent settlement, he did no more than he had a right to, and no more than was his duty, but the fact that the fraud was committed and repudiated, imposed no greater duty of active vigilance upon the plaintiff than would have otherwise existed with respect to the sureties. After the ward

had repudiated the fraud by offering to restore what he had received, and demanding the money from the guardian, he was not limited by any different period of time for instituting proceedings to call him to account than he would have been if the fraud had not been practiced upon him.

The estate of a deceased surety upon a bond of this character, joint in form, becomes discharged by the law as it existed when the obligation was given: *Getty v. Binsse*, 49 N. Y. 385; 10 Am. Rep. 379; *Wood v. Fisk*, 63 N. Y. 245; 20 Am. Rep. 528; *Risley v. Brown*, 67 N. Y. 160; *Hauck v. Craighead*, 67 N. Y. 432; Code, sec. 756.

But as this bond was several, as well as joint, we cannot see how the principle applies. The parties could have been sued jointly or separately, and the action revived against the personal representatives of the deceased defendant: Code, sec. 454.

One of the conditions of the bond was that the guardian would account. The sureties could not be made liable until after decree or judgment against the guardian in the proper court, and that decree or judgment constitutes the measure of their liability. If the court before which the accounting is had directs costs to be included in the judgment, then the costs are a part of the debt for which the sureties may be liable. So that sureties upon a bond of this character may be liable for costs included in a decree adjudging the amount due from the guardian, as their liability is generally coextensive with that of their principal. But in this case there never was any dispute between the plaintiff and the guardian with respect to the amount in his hands. After the plaintiff became of age, he assumed to settle with his guardian without any accounting, and to release him and to authorize the surrogate to enter a decree to that effect. The action in which costs were recovered was brought to get rid of these obstacles which stood in the way of proceedings upon the bond, and which had their origin in the plaintiff's consent, though induced by fraud. The costs of suits to set aside settlements and discharges made by the ward himself, when of full age and after he assumed the control and management of the estate, are not within the conditions of the bond, whatever the general rule may be as to costs upon an accounting. The plaintiff and his guardian agreed upon the amount due, and the fraud did not enter into the statement of the account, but consisted in inducing the plaintiff to accept in payment

the worthless obligations of a third party. The costs of an action to restore the ward to the position he occupied before he entered into that agreement, are not, we think, chargeable to the sureties. The judgment should, therefore, be modified by striking out all costs included therein of the former suit against the guardian, and of the appeals from that judgment, and all sums included for interest and extra allowance thereon, and, as so modified, affirmed, without costs to either party in this court.

All concur, except ANDREWS, C. J., dissenting.

GUARDIAN AND WARD — SURETIES ON GUARDIAN'S BOND, WHEN NOT RELEASED. — The record of the discharge of a guardian will not protect his sureties, if the order for the discharge was procured by the guardian's fraud: *Gillett v. Wiley*, 126 Ill. 310; 9 Am St. Rep. 587; the rule being that, where a court of competent jurisdiction, in a proceeding between the parties to the instrument, has, by decree, declared a release from a ward to his guardian to be void, for causes existing at its date, such release can no longer be regarded as a subsisting instrument for any purpose. It cannot be used either by the guardian himself, or by anyone standing in a relation of privity with or suretyship for him: *Parr v. State*, 71 Md. 220.

JUDGMENT AGAINST PRINCIPAL, EFFECT OF, AS EVIDENCE AGAINST SURETIES: See notes to *Charles v. Hoskins*, 83 Am. Dec. 380; *Stephens v. Shafer*, 33 Am. Rep. 802; *Robinson v. Baskins*, 22 Am. St. Rep. 204. The general rule as regards sureties on a guardian's bond is thus stated in one of the headnotes to the recent case of *Parr v. State*, 71 Md. 220, in the following terms: A decree adjudicating and directing the payment of a certain sum of money by the guardian to the ward, even though the sureties were not parties to the suit, is *prima facie* binding on them, and they can only relieve themselves of such binding effect of the recovery against the guardian by showing that the amount recovered was in excess of the amount which the plaintiff was entitled to recover, or that he was not entitled to recover at all. This statement of the rule is more favorable to the sureties than the authorities warrant. A decree or judgment against a guardian, executor, or administrator is generally conclusive against his sureties in the absence of fraud or collusion: *Freeman on Judgments*, sec. 180; note to *Charles v. Hoskins*, 83 Am. Dec. 383.

DOUGLASS v. PHENIX INSURANCE COMPANY.

[128 NEW YORK, 209.]

ABATEMENT OF ACTION BY PENDENCY OF ATTACHMENT IN ANOTHER STATE.

The right of the plaintiff to prosecute his action in the courts of his own state cannot be defeated by the pendency of attachment proceedings in another jurisdiction by the creditor there to reach the debt owing to the plaintiff by the defendant, where the only claim of jurisdiction by the foreign court rests upon statutory authority to seize the debt by and through process against the agent of a corporation in this state, which owes the debt, which agent resides in the state where the seizure is made.

ABATEMENT OF ONE ACTION BY ANOTHER. — THE PENDENCY OF AN ACTION IN ANOTHER STATE between the same parties for the same cause does not abate the suit.

JURISDICTION — ATTACHMENT. — In attachment proceedings, the *res* must be within the jurisdiction of the court issuing the process in order to confer jurisdiction.

CONFLICT OF LAWS — ATTACHMENT. — The *situs* of debts and obligations is at the domicile of the creditor, but the creditor of a nonresident may, in this state, attach a nonnegotiable debt or credit owing or due to him by a person within the jurisdiction where the attachment issues. To this extent the laws of the state, for the purposes of attachment proceedings, may fix the *situs* of the debt at the domicile of the debtor.

A CORPORATION DOES NOT CHANGE ITS DOMICILE OR PLACE OF RESIDENCE by constituting an agent in another state upon whom proceedings may be served in compliance with the laws of such other state, and to enable the corporation to do business there.

GARNISHMENT OF A CORPORATION IN ANOTHER STATE. — A domestic corporation at all times has its exclusive residence and domicile in the jurisdiction of origin, and it cannot be garnished in another jurisdiction for debts owing to it by home creditors, so as to make the attachment effectual against its creditor, in the absence of jurisdiction acquired over his person.

JURISDICTION — ATTACHMENT. — The law of a state cannot make a debtor a resident of that state by so declaring, contrary to the fact and the rule of general law, so as to bind another jurisdiction by the declaration, nor can any state authorize an attachment of a credit when neither the debtor nor the creditor is within its jurisdiction; and if such laws purport to authorize such attachment, the courts of this state are not bound to recognize a judgment based upon them.

G. A. Seixas, for the appellant.

William P. Cantwell, for the respondent.

ANDREWS, C. J. The defense demurred to is, in substance, that the debt owing by the Phenix Insurance Company to the plaintiff had been, prior to the commencement of this action, attached in the state of Massachusetts in an action in the superior court of that state, brought by John S. Alley and others against the parties in this action and the insurance

company, to recover a debt owing by the plaintiffs to the attaching creditors, and that the Massachusetts action was still pending. This defense was pleaded in abatement of the present action.

The Phenix Insurance Company is a domestic corporation organized under the laws of this state. On the fifth day of February, 1891, at Malone in Franklin County, it issued to the plaintiff, who then was and ever since has been, a resident of Franklin County, a policy of insurance insuring him against loss or damage by fire, in the sum of two thousand dollars, upon his stock of bark at his tannery in said county. The policy was delivered to the plaintiff and has ever since remained in his possession. The property insured was destroyed by fire May 10, 1891, and the plaintiff sustained a loss thereby exceeding the sum insured, for which under the policy the defendant became liable to pay the sum mentioned therein.

In determining the question whether the defense of foreign attachment set up by the defendant in its answer in abatement of this action, is good in law, the facts hereinbefore stated are to be taken as admitted. They are alleged in the complaint and are not denied by the defendant in its defense based upon the attachment proceedings. The answer does contain, in the part which precedes this defense, a denial of the allegation in the complaint as to the residence of the plaintiff and of the fact that from the fifth day of February, 1891, the date of the policy, he had at all times had possession thereof, and it expressly admits that the defendant is a domestic corporation. The attachment proceedings are set up as an affirmative defense to the cause of action alleged in the complaint, and its sufficiency in law is upon demurrer to be determined from what appears therein. The allegations of the complaint not denied in the affirmative defense are for the purposes of the question now presented to be deemed admitted. The affirmative defense is to be treated as a separate plea, and the defendant is not entitled to have the benefit of denials made in another part of the answer, unless repeated or incorporated by reference and made a part of the affirmative defense.

The answer in question alleges the appointment by the defendant of an agent in Massachusetts, under the laws of that state, upon whom process may be served, which was required as a condition of its doing business therein, and that it was

engaged in carrying on its business in that state; that in May, 1891, and prior to the commencement of the present action, an action was commenced in the superior court of Massachusetts in favor of Alley and others, against the present plaintiff, to recover a debt on contract owing by the present plaintiff to Alley and others, in which action the defendant (the Phenix Insurance Company) was joined and made a party defendant, as trustee of the plaintiffs in that action; that, "the said action was commenced by trustee process or writ directed to and against this defendant as trustee severally of the plaintiff herein." It alleges that the trustee process or attachment was served on the defendant by service on its attorney in Massachusetts, and that it was levied on the debt owing by the defendant to the plaintiff, and that by virtue of the statutes of Massachusetts and the proceedings referred to the debt owing to the plaintiff from the defendant passed into the custody of the law of Massachusetts and became subject to the control and disposition of the Massachusetts court, and that the attachment action and proceedings are pending and undetermined. The answer further alleges that under the law of Massachusetts and the proceedings mentioned, the Massachusetts court acquired jurisdiction of the parties to the action and of the subject-matter and control of the debt owing by the defendant to the plaintiff. In the fourteenth paragraph of the answer, it is alleged that the plaintiff had notice of all the proceedings in the attachment action, and full and ample opportunity to defend the same, "and that said plaintiff was and is named as a party defendant in said action, and was duly served with process therein." It is quite evident from reading the whole answer that the allegation that the plaintiff "was duly served with process" in the Massachusetts action, was not intended as an averment that personal service of process was made on the plaintiff within the state of Massachusetts. It at most can only mean that he was constructively served through service made on the garnishee or by publication. The answer in the prior clauses specifically points out how the action was commenced, viz., "by service of the trustee process" on the defendant, the garnishee. It was not claimed on the argument that plaintiff was in fact personally served with process, and it is not averred in the clause quoted that he was served within the state of Massachusetts. It must be assumed, therefore, on this appeal, that the attachment proceeding pleaded in abate-

ment to this action was commenced by process served on the agent of the defendant corporation in Massachusetts, and that the plaintiff, although named as a defendant in the proceedings, was never served with process in that state, and never appeared in the action.

In the view we take of the case it may be further admitted, as claimed by the defendant, that it sufficiently appears by the averments in the answer, that by the law of Massachusetts, the debt due to the plaintiff, a resident of this state, from the defendant, a corporation of this state, could be attached and held under trustee process served on the defendant's agent in that state, in proceedings instituted by a creditor of the plaintiff in Massachusetts, and this although the plaintiff was neither served with process in Massachusetts nor appeared in the action.

We are of opinion that the answer demurred to was insufficient in law to stay the further prosecution of this action. The right of the plaintiff to prosecute his action in the courts of his own state cannot be defeated by the pendency of attachment proceedings in another jurisdiction by a creditor there, to reach the debt owing to the plaintiff by the defendant, where the only claim of jurisdiction by the foreign court rests upon statutory authority to seize the debt by and through process proceedings against the agent of a corporation of this state which owes the debt, but which has an agent in the state where the seizure is made. The pendency of a suit *in personam* in one state is not according to the general rule pleadable in abatement of a suit subsequently commenced in another state, between the same parties, on the same cause of action, although the courts of the state where the prior suit is pending had complete jurisdiction. The court, on application, may, in its discretion, grant a continuance by reason of the pendency of the first action, and a judgment once obtained in one of the actions would, on application of the court, be allowed to be set up in bar of the further prosecution of the other. But the pendency of an action in another state, between the same parties and for the same cause, does not, according to the general rule, abate the second suit: *Bowne v. Joy*, 9 Johns. 221; *Walsh v. Durkin*, 12 Johns. 99; *Oneida County Bank v. Bonney*, 101 N. Y. 173; *Cook v. Litchfield*, 5 Sand. 330. An exception to this general doctrine was made in this state in the early case of *Embree v. Hanna*, 5 Johns. 101, in respect to prior attachment proceed-

ings instituted in the state of Maryland under the laws of that state against a debtor of a New York creditor, by a creditor of the latter. The New York creditor subsequently commenced an action in this state against his Maryland debtor, to recover the debt, and the defendant pleaded in abatement the pendency of the attachment proceedings in Maryland, and the plea was held to be good, on the ground that the debtor might otherwise be compelled to pay the debt twice.

But attachment suits partake of the nature of suits *in rem*, and are distinctly such when they proceed without jurisdiction having been acquired of the person of the debtor in the attachment. Real and personal property may be subjected to seizure and sale for the payment of debts of the owner, according to the laws of the state or sovereignty where the property is, having regard to the fundamental condition that due process of law shall precede the appropriation. It is undeniable that a state may authorize the seizure and sale by means of appropriate judicial proceedings of property of non-residents within the jurisdiction for the payment of their debts. There must be notice and an opportunity to be heard, either actual or constructive, in such way and form as the law may prescribe. But no state can subject either real or personal property out of the jurisdiction to its laws. It may, and often does, compel persons, through the process and judgment of its courts, to perform acts which affect their title and interest in and to property outside the limits of the state. Having acquired jurisdiction of the person, the courts can compel observance of its decrees by proceedings *in personam* against the owner within the jurisdiction. But it is a fundamental rule that in attachment proceedings the *res* must be within the jurisdiction of the court issuing the process, in order to confer jurisdiction: *Plimpton v. Bigelow*, 93 N. Y. 593. In the case of movables, their seizure under the attachment shows that their actual *situs* is within the jurisdiction. But in respect to intangible interests, debts, choses in action, bonds, notes, accounts, interests in corporate stocks, and things of a similar nature, the question whether the *res* is within the jurisdiction of the sovereignty where the process is issued, is not so readily determined. The general rule is well settled that the *situs* of debts and obligations is at the domicile of the creditor. But the attachment laws of our own and of other states recognize the right of a creditor of a non-

resident to attach a debt or credit owing or due to him by a person within the jurisdiction where the attachment issues, and to this extent the principle has been sanctioned that the laws of a state, for the purposes of attachment proceedings, may fix the *situs* of a debt at the domicile of the debtor: *Embree v. Hanna*, 5 Johns. 101; *Williams v. Ingersoll*, 89 N. Y. 508, 529. It is at least doubtful whether this qualification of the general rule applies to negotiable instruments or other written obligations of a resident debtor, held by and in the possession of his nonresident creditor: See *Osgood v. Maguire*, 61 N. Y. 524. But we repeat, no court can acquire jurisdiction in attachment proceedings unless the *res* is either actually or constructively within the jurisdiction, and we are of opinion that the attempt to execute an attachment in Massachusetts upon the debts owing to the plaintiff by the insurance company, by serving upon the agent of the corporation there, and without having acquired jurisdiction of the plaintiff, must fail for the reason that the debtor, the insurance company, was in no just or legal sense a resident of Massachusetts and had no domicile there, and was not the agent of the plaintiff, and that in contemplation of law the company and the debt were at the time of the issuing of the attachment in the state of New York, and not in the state of Massachusetts. This court has had occasion heretofore to consider the effect of the act of a foreign corporation constituting an agent in another state, upon whom proceedings may be served, done in compliance with the laws of such state in pursuance of a condition imposed, and to enable the corporation to do business in such state. It has been held that by such act the corporation does not change its domicile of origin or its residence. It becomes bound by judgments rendered upon service on the designated agent, because it has consented so to be bound, but it remains as before a resident of the state where it is incorporated: *Gibbs v. Queen Ins. Co.*, 63 N. Y. 114; 20 Am. Rep. 513; *Plimpton v. Bigelow*, 98 N. Y. 593. If, in this case, the insurance company could be regarded as residing or having its domicile in Massachusetts for the purpose of attachment proceedings, it likewise has a domicile in every state where it may have appointed an agent under similar laws, and so constructively, upon the theory upon which the Massachusetts attachment is defended, the corporation is present as debtor to the plaintiff in every state where such agency exists, and the credit is also present at the same time

in each of such jurisdictions. The admission of such a principle would give rise to most embarrassing conflicts of jurisdiction and subject creditors of domestic corporations to great prejudice. We think the rule is that a domestic corporation at all times has its exclusive residence and domicile in the jurisdiction of origin, and that it cannot be garnished in another jurisdiction for debts owing by it to home creditors, so as to make the attachment effectual against its creditor in the absence of jurisdiction acquired over the person of such creditor.

The defendant calls attention to general averments of jurisdiction by the Massachusetts court, acquired under the laws of Massachusetts, contained in the answer. The laws of that state are not set out, and we cannot know how far they assume to authorize attachment proceedings under the circumstances existing in this case. But the question in this state cannot be controlled by the statutes of Massachusetts. The legal proceedings or judgments of another state are recognized here only where jurisdiction has been acquired in the foreign forum. But it is only jurisdiction in an international sense or according to the course of common law, and judicial proceedings which conform to, or rather, which are not taken in disregard of the principles and rules of general jurisprudence, which this state is bound to recognize, and if the laws of Massachusetts go to the extent claimed, and assume to authorize attachment proceedings to seize a credit owing to a resident of this state, when neither the debtor nor creditor are within the jurisdiction, this state is not, we think, bound to recognize them. The law of a state cannot make a debtor a resident of that state by so declaring, contrary to the fact and the rule of general law, at least so as to bind another jurisdiction by the declaration.

We deem it unnecessary to consider the position of the defendant. If it may be subjected to embarrassment, or even to a double judgment, it will be, in consequence of its own act, in voluntarily subjecting itself to the laws of Massachusetts. The power of the court to grant a continuance in a proper case will generally afford a remedy to a party so situated. But the plaintiff ought not to be prejudiced or prevented from collecting his debt in this state. This court has disclaimed jurisdiction in the courts of this state to attach debts owing by a foreign corporation, or interests in the stock of such corporations belonging to nonresidents, by notice or

process served on the agents of such corporations in this state: *Plimpton v. Bigelow*, 93 N. Y. 593; *Straus v. Chicago etc. Co.*, 46 Hun, 216; affirmed in 108 N. Y. 654. The court in these cases construed the attachment laws in view of the principles of general jurisprudence, although the language of the statutes embraced the cases in question.

The judgment should be affirmed.

THE PENDENCY OF AN ACTION IN A FOREIGN COURT will not abate an action in a domestic court: See cases cited in notes to *Smith v. Lathrop*, 84 Am. Dec. 456, and *West v. McConnell*, 25 Am. Dec. 195 et seq.; *O'Reilly v. New York etc. R. R.*, 16 R. I. 388.

ATTACHMENT — JURISDICTION. — PROPERTY OUTSIDE THE STATE CANNOT BE GARNISHED: *Bates v. Chicago etc. R'y Co.*, 60 Wis. 296; 50 Am. Rep. 369; *Bowen v. Pope*, 125 Ill. 28; 8 Am. St. Rep. 330.

THAT THE SITUS OF DEBTS AND OBLIGATIONS IS AT THE DOMICILE OF THE CREDITOR, see authorities cited in note to *Missouri Pac. R'y Co. v. Sharitt*, 19 Am. St. Rep. 145; *Louisville etc. R. R. Co. v. Dooley*, 78 Ala. 524; *Alabama etc. R. R. Co. v. Okumley*, 92 Ala. 317.

GARNISHMENT OF FOREIGN CORPORATIONS. — A foreign corporation doing business in the state may be garnished for debt due to nonresident employee, contracted outside the state, and exempt from garnishment in the state where defendant and garnishee reside: *Burlington etc. R. R. Co. v. Thompson*, 31 Kan. 160; 47 Am. Rep. 497. But the fact that a corporation doing business in another state has there paid the amount for which it has been garnished, will not be a bar to a subsequent action by its creditor, in the state of its residence, to recover that amount, unless it is shown that, by the statutes of the foreign state, the court there had acquired jurisdiction of the debt sought to be reached and subjected: *Alabama etc. R. R. Co. v. Okumley*, 92 Ala. 317. The regulation of the service of garnishee process upon foreign corporations is absolutely within the discretion of the legislature, and the fact that a foreign corporation is exempt from process of garnishment under the laws of its home state will not exempt it from such process in another state where it is doing business, if the laws of that state provide that such service may be made upon it: *First Nat. Bank v. Burch*, 80 Mich. 242.

THE RESIDENCE OF A CORPORATION is deemed to be within the state creating it and where its principal office or place of business is: *Sangamon etc. R. R. Co. v. Morgan Co.*, 14 Ill. 163; 56 Am. Dec. 497; *Connecticut etc. R. R. Co. v. Cooper*, 3 Vt. 476; 73 Am. Dec. 319. But corporations may also have a second domicile for purposes of suing and being sued: *Raymond v. City of Lowell*, 6 Cush. 424; 53 Am. Dec. 57.

FOLEY v. MUTUAL LIFE INSURANCE COMPANY.

[123 NEW YORK, 233.]

GUARDIANSHIP IN SOCAGE exists only when an infant under fourteen years of age is seized of real estate. The right of guardianship is in such only of the infant's next of kin as cannot take by inheritance from him; and as between kin equally entitled, the one who first obtains possession of the infant has the custody of him.

GUARDIAN IN SOCAGE HAS AN ESTATE IN THE LANDS OF HIS WARD and can maintain in his own name any appropriate action to recover the rents and profits, and to recover damages for trespass and waste upon the land, and to recover possession of the land itself.

GUARDIAN IN SOCAGE HAS NO POWER TO SURRENDER FOR CANCELLATION A POLICY OF LIFE INSURANCE of which his ward is the beneficiary, and it is doubtful whether he has any authority whatever over any of the personal property of his ward.

MERE ACQUIESCENCE ON THE PART OF A WARD will not estop him from asserting his rights to the policy of life insurance surrendered by his guardian in socage without having authority so to do

GUARDIAN AND WARD.—**THE FACT THAT A GUARDIAN USED SOME OF THE PROCEEDS** of an unauthorized disposition of property of his ward for the benefit of the latter does not estop the ward from recovering such property nor make him answerable for any of such proceeds when the guardian was also his father, subject to the parental duty of supporting and caring for him, and there is nothing to show that the father was not able to perform such duty or to respond in damages to the person to whom he sold such ward's property without authority.

ACTION to have the surrender of a policy of life insurance adjudged void and the policy restored to the plaintiffs on the payment by them of certain premiums. The policy in question was an endowment policy on the life of John Foley, plaintiff's father, and was issued January 30, 1876. In 1879 he assigned it to his wife and children. Afterwards in the same year, she died testate, appointing him executor of her estate and guardian of her children, and devising and bequeathing all her property to them. In April, 1880, he, professing to act as such executor and as guardian of his children, surrendered the policy, receiving therefor seven thousand two hundred twenty-nine dollars. All the children were then minors. Two of them coming of age, a guardian was appointed for the others, and a tender was made in 1890 in behalf of all the children of certain unpaid premiums and a demand was made that the policy be reinstated. This tender and demand being refused, the present action was brought. The trial court declared the surrender void and the plaintiffs entitled to the relief which they sought.

Edward L. Short, for the appellant.

Herbert Green, for the respondents.

EARL, J. Mrs. Foley had no power by her will to constitute her husband guardian of her minor children, and while he assumed to act as such it is now conceded that he was not their testamentary guardian, and that he derived no power under the will of his wife to act as such. But they took under the will of their mother real estate, and hence it is claimed on behalf of the defendant that he became the guardian in socage of his minor children under the provisions of the Revised Statutes where it is provided in section 5 (4 Rev. Stats., 8th ed., 2418), as follows: "Where an estate in lands shall become vested in an infant, the guardianship of such infant, with the rights, powers, and duties of a guardian in socage, shall belong: 1. To the father of the infant; 2. If there be no father, to the mother; 3. If there be no father or mother, to the nearest and eldest relative of full age, not being under any legal incapacity, and as between relatives of the same degree of consanguinity males shall be preferred." Section six provides that, "To every such guardian, all statutory provisions that are, or shall be in force relative to guardians in socage, shall be deemed to apply." As a guardian constituted by this statute is clothed with the rights, powers, and duties of a guardian in socage, it becomes important to know what were the powers, duties, and authority of a guardian in socage at common law prior to the revised statutes.

Guardianship in socage was an incident of the feudal tenures existing under the English common law of real estate, and existed only where an infant under fourteen years of age was seized of real estate. No person could be a guardian in socage who could inherit from the infant; but the right of guardianship was in such of the infant's next of kin as could not take by inheritance from him the socage estate in respect of which the guardianship arose; and if there was one or more in common degree of relationship, he who first obtained possession of the infant generally had the custody of him. The guardian in socage was recognized as having an estate in the land of his ward, and he could maintain in his own name any appropriate action to recover the rents and profits and to recover damages for trespass or waste upon the land, and to recover possession of the land itself. As the common-law socage tenure was swept away by the Revised Statutes, the

statutory guardianship was constituted by those statutes to take the place of the common-law guardianship in socage, and it may for convenience be called by the same name. The guardianship there constituted was like the guardianship in socage at common law, except that it continued until the infant reached the age of twenty-one years, and relatives who could inherit from the infant were not excluded. It is claimed by the plaintiffs that Foley as guardian in socage under these provisions of the Revised Statutes had no power to surrender the insurance policy. The defendant, on the contrary, claims that he did have such power, and the counsel on both sides have, with great diligence and industry, examined and brought to our attention numerous authorities which are claimed to bear upon this controverted question. We have carefully examined them all and are satisfied that as such guardian Foley had no power to surrender the policy.

It is claimed on the part of the plaintiffs that guardians in socage at common law had to do only with the real estate of their wards, and, we think, that is substantially true. Such a guardian could have no being whatever, except when the infant was seized of real estate in socage tenure, and as that was essential it may be inferred that his powers and duties related to the real estate on account of which his guardianship was constituted. In the early history of the common law there was very little personal property, and the guardianship of the infants and of their real estate was very naturally the main object of the law. It is probable that as the guardian in socage was entitled to the possession of the real estate he also took possession of the animals, implements, and other personal property connected with the real estate, and having possession, he could probably maintain an action for any interference with such personal property without right or authority by a mere stranger, and that he thus had the control of such personal property as well as of all the real estate. Our own researches, aided by the industry of counsel, have not brought to our attention a single case in England or in this country where the question has directly arisen as to the power of a guardian in socage over the personal property of his ward; and it has never been decided or intimated in any judicial opinion that such a guardian could reduce to possession the choses in action of his ward, or release, discharge, or dispose of them. In Coke on Littleton (1 Am. ed., Butler and Hargraves' Notes, 88 B), the learned editors say: "But

whether the guardian in socage is entitled to take into his custody the infant's personal estate, we have not yet been able to ascertain by any express authority." But they also say that they are inclined to think that the personalty was under the control of the guardian in socage, except where by the custom of the particular place it happened to be liable to a different custom; and they claim that their views are strongly confirmed by the manner in which the act 12 Charles II. c. 24, regulated the powers of a guardian which it enabled the father to appoint. That act authorized the father by will or deed to appoint a guardian for his minor children, and the guardian thus appointed was authorized to take the custody of the infant's personal estate as well as his real estate, tenements, and hereditaments, and bring such actions in relation thereto, "as a guardian in common socage might do." And the reasoning of the learned editors is that these words necessarily import that the personal estate of infants was equally with their real estate subject to the custody and control of the guardian in socage. The provisions of that statute were substantially enacted in this state by chapter 47 of the laws of 1787, and they have continued ever since and are now found in the Revised Statutes (4 Rev. Stats., 2612); and the provision now is in section three, that the guardian thus appointed by the father shall "take the custody and management of the personal estate of such minor, and the profits of his real estate during the time for which such disposition shall have been made, and may bring such actions in relation thereto as a guardian in socage might by law." We think the inference to be drawn from this statute, that a guardian in socage had the control and possession of all the personal estate of his ward and could bring any action in reference thereto as he could in reference to any of the real estate, is very uncertain and unsatisfactory. As before stated, it is probably true that a guardian in socage, having the possession of the personal property of his ward, used on and connected with his land, could bring actions in reference to the same. But we do not think it is a legitimate inference from these statutes that a guardian in socage had the control at common law of all the personal property of his ward, and that he could use, manage, and dispose of it like a general owner possessing the title to the same. There was no reason for giving such a power to the guardian in socage growing out of the feudal tenure or the policy of the common law.

An infant even below the age of fourteen possessed of personal property could select his own guardian, and a guardian of such an infant could also be appointed by the ecclesiastical courts and by the chancellor. If the infant possessed choses in action which he desired to reduce to possession, he could bring an action in his name and have a guardian *ad litem* appointed for that purpose. There was, therefore, no occasion to vest a guardian in socage, usually a distant relative, with the power and control over the infant's personal estate. Soon after the passage of the statutes of Charles II., Chief Justice Vaughan, in *Bedell v. Constable*, Vaughan's Rep. 186, said that a guardian in socage did not have the custody of the goods and chattels of the ward. That was merely an expression of opinion of the learned chief justice, as it was not necessary to the decision of the case then under consideration. Our attention is called to text-writers and to the opinions of judges, some of which affirm and some of which deny that guardians in socage had the custody and control of the personal estate of their wards. There is more said upon the subject in *Thomas v. Bennett*, 56 Barb. 197, than in any other case that has come to our attention. In that case the action was brought by the general guardian in his own name, to recover a debt due to the infant, and the question was whether the action was maintainable, and the learned judge went into a discussion of the power of statutory guardians and guardians in socage. Among other things he said: "The guardian in socage may sue for claims covering the real estate of his ward, but cannot sue to recover his personal property," and "it is true that the guardian in socage can bring no suit except in regard to the real estate, and for the rents and profits of it; but this is so because he has no control whatever over the other personal estate of his ward, and, therefore, I think, although the language of the section is somewhat loose (section three of the Revised Statutes above cited), the legislature intended to confer the same right upon the general guardian to sue in relation to any of the property under his control that the guardian in socage possessed in reference to the property of which he had charge." When the lawmakers came to deal with the subject of guardians in socage in the Revised Statutes, personal estate had come to be a very large share of the property of the country, and if they had intended that the guardian in socage should have control of the personal property of his ward they would have said so in plain and misun-

takable terms. If the contention of the defendants is well founded, then the personal estate of an infant, who possesses real estate however small, will be at the absolute disposal of the near relative who may assume to act as guardian in socage under the statute, without any of the guards, or the security which the law with great care and particularity surrounds the estates of infants, to protect them against the misconduct and maladministration of guardians. Such a guardianship of the infant's personal property is against the entire policy of our laws, and is sanctioned by no precedent and no practice in this state, and is, we believe, against the general understanding of lawyers and judges. Therefore, without a fuller discussion and without a criticism of the authorities to be found in the briefs submitted to us, we have reached the conclusion that Foley had no power or right to surrender the policy to the defendant for cancellation.

It is, however, claimed by the defendant that the plaintiffs so far acquiesced in and ratified the surrender of the policy that they cannot now repudiate it and reclaim the policy. It was surrendered without their knowledge when they were minors. There is no satisfactory proof that they ever intentionally or consciously acquiesced in the surrender, or ratified it, or that they ever took the fruits of it. They did nothing to mislead or to prejudice the defendant. They have in no way deprived it of its remedy against their father for wrongfully obtaining the money for the policy; and before infants thus situated can be held estopped from enforcing their claim to the policy, their acts of ratification and acquiescence should be very clear and explicit. Mere acquiescence alone would not be sufficient to estop them from asserting their rights. We need to add nothing to what has been said in the opinions of the special and general terms upon this point.

The defendant alleged in its answer that some of the money received by Foley upon the surrender of the policy was applied to the use and benefit of the plaintiffs; and upon the trial, having Foley under examination as a witness, defendant's counsel, after proving that he received seven thousand two hundred twenty-nine dollars from the defendant upon the surrender of the policy, asked him: "Did you apply that money to the benefit of these plaintiffs?" This question was objected to generally by the plaintiffs, and the court replied: "I will allow him to state that generally, simply for the purpose of a reference, if it should be necessary." The witness

then answered: "I did." He was asked no further questions, and gave no further evidence of the use made by him of the money. It is now claimed by the defendant that the court at special term should have ordered a reference to ascertain whether any of the money had been used for the benefit of the plaintiffs in such a way that they could be charged with the same, or that the defendant would be entitled to a credit for the sum that would otherwise be recoverable from it. There was no proof that Foley was not perfectly able to respond to the defendant for the amount of money received by him from it upon the surrender of the policy. He was bound to support his own children out of his own means; and it does not appear that he was not abundantly able to do so; and if he took this money, and used it for the support of his children, instead of using his own means for that purpose, the children did not become responsible for the money so used. The defendant was permitted to give all the evidence it offered upon the subject; and upon all the evidence in the case, it was impossible for the court to find that the money received by Foley from the defendant was so applied for the benefit or use of the plaintiffs as to make them accountable for it to the defendant. It was bound to make a case showing that there was something to be accounted for to apply upon the demand against it, and then, and not till then, would a reference have been proper to ascertain the amount.

Therefore, after a full consideration of the very able argument submitted to us on behalf of the defendant, we are not convinced thereby, but have reached the conclusion that the judgment should be affirmed, with costs.

All concur, except PECKHAM, J., taking no part.

GUARDIANSHIP IN SOCAGE under the common law and under the Revised Statutes of New York is discussed in *Combs v. Jackson*, 2 Wend. 153; 19 Am. Dec. 568; *Fonda v. Van Horne*, 15 Wend. 631; 30 Am. Dec. 77.

HOLMES v. GILMAN.

[133 NEW YORK, 309.]

TRUST FUNDS — RIGHT TO PURSUE. — A *cestui que trust* has the right to follow trust funds, and to appropriate to himself the property into which such funds have been changed, together with the increased value of such property, provided the funds can be clearly ascertained, traced, and identified, and the right of *bona fide* purchasers do not intervene.

EVERY PARTNER OCCUPIES A FIDUCIARY POSITION with respect to his copartners and the funds of the firm, and will not be permitted to make a personal profit out of the use of such funds. A wronged partner is entitled to the same remedy as that existing against a trustee in favor of his *cestui que trust*.

IF A PARTNER ABSTRACTS THE FUNDS OF A FIRM, though such abstractions are not technically embezzlements, his copartners have the right to follow such funds and the property in which they may have been invested to the same extent as if the partner had held the funds as trustee for his copartners.

INSURANCE — LIFE. — AN INTEREST, TO BE INSURABLE, must be an interest in favor of the continuance of the life, and not an interest in its loss or destruction.

INSURANCE — LIFE. — AN INSURABLE INTEREST IN THE LIFE OF ANOTHER IS NOT PROPERTY.

INSURANCE, PARTNERSHIP FUNDS FRAUDULENTLY INVESTED IN. — If a partner fraudulently abstracts partnership funds, and invests them in a policy of insurance upon his own life, payable to his wife in the event of his death, the partnership is entitled to the proceeds of such policy.

ACTION to have an accounting of moneys claimed to have been wrongfully taken by Arthur C. Gilman while a member of a firm of which the plaintiff herein was the other partner, and also to have paid over to plaintiff the amount of the proceeds of an insurance policy, the premiums of which, it was claimed, had been paid by Gilman out of funds unlawfully abstracted by him from the partnership. It appeared on the trial that he had used the moneys of his firm, as alleged in the complaint, to the extent of two hundred thousand dollars, out of which sum he had paid about four thousand dollars on premiums on policies of insurance on his own life, made payable to his wife, and that the aggregate proceeds of such policies were about forty-five thousand dollars. The decree of the trial court granted the relief prayed for, directing the proceeds of the policies to be paid to the plaintiff.

George Hoadly, for the appellant.

James G. Janeway, for the respondent.

PECKHAM, J. It is stated in the order which reverses the judgment herein, that it is reversed upon questions of fact as well as of law. In such case it is the duty of this court to review the determination of the court below upon both questions of fact and of law: Code Civ. Proc., sec. 1338. A careful review of the case convinces us that the findings of fact made by the referee are amply sustained by the evidence and that the judgment should not be reversed on the facts. We are confirmed in the correctness of this view upon a perusal of the opinions delivered by the learned judges at the general term. We there find that the order reversing the judgment upon questions of fact as well as of law was formal merely, the judgment being actually reversed because the court below took a different view of the law from that adopted by the referee upon his own findings of fact.

The claim of the plaintiff to recover the moneys arising from the payments of these policies is based upon the principle which allows a *cestui que trust* to follow trust funds and to appropriate to himself the property into which such funds have been changed, together with the increased value of such property, provided the trust fund can be clearly ascertained, traced, and indentified, and provided the rights of *bona fide* purchasers for value, without notice, do not intervene.

The right has its basis in the right of property, and the court proceeds on the principle that the title has not been affected by the change made of the trust funds, and the *cestui que trust* has his option to claim the property and its increased value as representing his original fund. The right to follow and appropriate ceases only when the means of ascertainment fail. It is a question of title: *Van Alen v. American Nat. Bank*, 52 N. Y. 1; *Newton v. Porter*, 69 N. Y. 133; 25 Am. Rep. 152; *Ferris v. Van Vechten*, 73 N. Y. 119; *Matter of Cavin v. Gleason*, 105 N. Y. 256, 260; *In re Hallett's Estate*, L. R. 13 Ch. Div. 696. It is somewhat akin to the principle decided in *Silbury v. McCoon*, 3 N. Y. 379, 53 Am. Dec. 307, where corn was wrongfully taken from its owner and converted into whisky. The court held the property was not changed in the hands of the wrongdoer and the whisky belonged to the owner of the original material, no matter how much it had been increased in value. The case of *Pennell v. Deffell*, 4 De Gex, M. & G. 372, 388, 389, discusses the principle as thus stated and agrees to it.

That a partner occupies a fiduciary position with regard to

his copartners and the funds of the firm, and will not be permitted to make a personal profit out of the use of such funds, is, I think, clearly established: 1 Lindley on Partnership, 2d Am. ed. 803; *Featherstonhaugh v. Fenwick*, 17 Ves. 298; *Anderson v. Lemon*, 8 N. Y. 236; *Mitchell v. Reed*, 61 N. Y. 123; 19 Am. Rep. 252; *Riddle v. Whitehill*, 185 U. S. 621. Although partners do not in the strict sense of the term occupy the position of trustees towards each other and towards the firm funds, yet the position is one of a fiduciary nature, calling for the maintenance and exercise of the greatest good faith between them. Such a relationship authorizes the same remedy on behalf of the wronged partner as would exist against a trustee, strictly so called, on behalf of a *cestui que trust*: Per Jessel, M. R., *In re Hallett's Estate*, L. R. 13 Ch. Div. 696, 712. While legally incorrect to describe the fraudulent abstractions made by Gilman of the funds of the firm as embezzlements, the description is harmless. It was a monstrous and gross breach of the duty he owed the firm, and the right of the firm to follow the funds is not affected because the act could not be regarded in law as an embezzlement. The right to follow the funds springs from the fiduciary nature of Gilman's position with regard to them. These general positions are not really denied by the defendant. It is claimed, however, that the tracing and identification of the funds have not been sufficiently proved in fact, and it is also urged that there has been an actual mingling of firm funds with the private funds of Gilman in the purchase and maintenance of the policies. I have looked carefully through the evidence upon these questions of fact, and I think the findings of the referee are fully sustained and that no exception can prevail on such grounds.

If these preliminary questions be decided against him, the counsel for defendant then urges that the rule clearly is, if the trust fund has become mingled with money or property of the trustees or others, equity impresses the proceeds with a trust to an amount equal to the original trust fund, and interest, and will go no further. He then claims that the firm funds which went to the purchase of the policies and the payment of the annual premiums were mingled with the property right of the wife, called her insurable interest in her husband's life, and so the policies were not wholly the result of the use of those firm funds, and, therefore, the plaintiff can have only a lien on the policies or the moneys arising from

their payment, to the amount of the premiums paid with the firm funds, and the interest thereon. This is really the chief question in the case.

Where moneys have been misapplied and have been used as a portion of a larger amount which has been invested in other property, the property thus acquired does not as a whole belong to the owner of the moneys misapplied. It does not belong to him because it has not been purchased or acquired wholly with his money or funds, and hence it is that such property is held charged with a lien at least to the amount of the trust funds invested in it. It is not necessary to here decide it because we take another view of the facts, but I am not at all prepared to admit that under no circumstances is the *cestui que trust* entitled to recover back anything more than the amount of his property and interest, where there has been a mingling of funds. In case the trustee took a thousand dollars of trust funds and five hundred of his own, and purchased property which advanced in value to twice its original sum, I have seen no case where the point has been determined that the whole increased value belongs to the trustee, and that only the original sum wrongfully taken and interest can be given to the *cestui que trust*, although it was by reason of the wrongful use of the trust funds that the trustee was enabled to realize such value. If in such case the *cestui que trust* were not allowed to at least participate proportionately in this increased value it would appear to be a violation of the principle that the trustee cannot ever be permitted to make a profit out of the use of the trust funds. It seems to me to be a case for the application of the doctrine that the parties became co-owners of the property at the option of the *cestui que trust*, in the proportion which their various contributions bore to the sum total invested.

In this case, however, the defendant is enabled to claim a mingling of funds and property only by treating the right of a wife to insure the life of her husband for her benefit as a species of property of her own which has been mingled with the funds of the firm, the result of the combination being the procurement of the policies.

We do not regard this right as property in any such light as to bring the case within the principle of the authorities upon the subject of a mingling of funds in the purchase or acquisition of other property. The right of a wife to insure the life of her husband for her own benefit is not property.

It is more in the nature of a power or a privilege to make a valid contract. It is a *status* and not a property right. The common law upon motives of public policy held that there must be what was termed an insurable interest in the life which was insured, or else the policy was a dangerous kind of a wager, and therefore void.

To take a policy out of such a class it was necessary to show that the insured had some interest in the continuance of the life of the *cestui que vie*. Who had such an interest as to give a right of insurance was frequently a matter of some discussion and of possible doubt. It may not even now perhaps be said that the precise nature, character, and extent of the interest in another's life, which shall render that life insurable, have been formally and plainly laid down. It is said by the federal supreme court that one essential is that the policy shall be obtained in good faith, and not for the purpose of speculating upon the hazard of a life in which the insured has no interest: *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 457, 460.

An interest which is insurable must be an interest in favor of the continuance of the life, and not an interest in its loss or destruction. If any person could be thought to have an interest in the continuance of the life of another, it would be a wife in the life of her husband. Judge Allen, in *Baker v. Union Mut. Life Ins. Co.*, 43 N. Y. 288, regarded the question as decided that a wife had at common law an insurable interest in the life of her husband. Judge Andrews held to the same effect in *Brummer v Cohn*, 86 N. Y. 11, 14; 40 Am. Rep. 503. These cases favor the view that the statute upon the subject of the insurance of the husband's life in favor of his wife, while it regulates, does not create the right. I do not intimate that if the statute created the right it would in any way alter its nature. That such a policy was valid at common law simply makes it clearer that it is the nature of the relationship between man and wife that makes the policy valid, and relieves it from the objection that it is a wager policy. That relationship is not property in any fair sense of the term. It creates an insurable interest in the life of another, of a nature the same as a parent has in a child, or a child in a parent; that is, an interest in the preservation of the life, and not in its destruction. Being so circumstanced, a policy of insurance upon such life is not a wager policy, and is, therefore, a valid policy. It is the same question, but it

may perhaps appear a little clearer when it is asked whether the power or privilege of a parent or child or creditor to insure the life of his child or parent or debtor is property?

A man has an insurable interest in his own life. If he take trust funds and procure such insurance, has he thereby mingled those funds with other property, i. e., with his right to insure his own life? And can it be said that the policy is the product of such mingled funds and property so that nothing but the original amount of the trust funds and interest can be recovered back from the estate? The fact is apparent that a policy of insurance upon a life is not a policy of indemnity. The sum named in the policy is to be paid when the insured life has ceased, no matter how really valueless such life may have in the meantime become. The power of the wife to procure insurance is not in the least unfavorably affected by the fact that insurance in her favor has already been secured. As was said by Shaw, C. J., in *Loomis v. Eagle Life etc. Ins. Co.*, 6 Gray, 396, the amount of the insurance is immaterial. The premium is computed upon the law of averages, to be the exact equivalent for the risk. So if insurance had been taken out by the husband on his life in the wife's name, she could herself take out more upon just as favorable terms and just as expeditiously as if none had been taken. No one company might desire to go above a certain amount upon any one risk, but the ability to procure further insurance is practically unrestrained. The wife has, therefore, suffered no loss by the original procurement of this insurance and its subsequent maintenance unknown to her, so long as the premiums have not been paid with her moneys or in any way from her estate. In other words her property has not been used for any purpose. Her power to obtain valid insurance upon his life remained wholly unimpaired and unaffected by the insurance already obtained.

The fact that she had what is termed an insurable interest was only material for the purpose of upholding the validity of the insurance in question. I cannot see how it can be regarded as property in any event. That a life insurance policy has not the features of a contract of indemnity and is not such a contract, has been unquestioned for a number of years: *Rawls v. American Mut. Life Ins. Co.*, 27 N. Y. 282; 84 Am. Dec. 280; *Olmsted v. Keyes*, 85 N. Y. 593.

The case of these policies is very much like that in *Baker v. Union Mut. Life Ins. Co.*, 43 N. Y. 283, where Judge Allen

said the insurance was effected by the husband for the benefit of his wife and as a provision for her in case of his death. It was there stated that the case would not be changed if the policy were regarded as having been procured by the wife, because the husband was in truth the actor and represented the wife, and she, in claiming the benefits of the policy, necessarily ratified and confirmed the compact as it was made, and with all its terms and conditions. Therefore, this case is to be looked at with reference to the fact that every dollar of the moneys which procured and maintained these policies in existence belonged to the firm represented by the plaintiff, and that Gilman had no more right to invest or use these funds in the manner he did, than would any third person who had procured them without any right or title.

It has been said that the husband when he procures an insurance for his wife's benefit, acts as her agent or represents her, and that she has a vested interest in the policies the moment they are delivered by force of the statute permitting them to be made in this form: *Whitehead v. New York Life Ins. Co.*, 102 N. Y. 143; 55 Am. Rep. 787. This is doubtless true in the case of the husband procuring the insurance with funds which belong to him or to his wife, but where the premiums are paid with moneys which in truth do not belong to him, and which the husband misapplies in so paying, and by which he violates his obligation to the true owner of the moneys thus used, the wife in such case must claim the policy subject to the means by which the husband procured it and she must adopt all his methods. The moneys in the hands of the company could not be recovered back by the *cestui que trust* if received by the company in good faith, because it would stand in the position of a *bona fide* purchaser, yet the policy itself would stand as the representative of these trust moneys, and the right of the wife would be to that extent subordinate.

This principle has, in effect, been decided in New Jersey in the case of *Shaler v. Trowbridge*, 28 N. J. Eq. 595.

It was there held upon almost identical facts that there was no public policy which favored the wife at the expense of the principle that trust funds could be followed, and that no profit could in any way arise in favor of the trustee who used them. It also held that the wife could not be permitted to avail herself of the proceeds of policies paid for her by her husband with trust funds. It is true in that case the poli-

oies were originally taken out in the name of the husband and subsequently made payable to the wife, and it is urged that there is a difference in the two cases, because in the New Jersey case it was the husband's insurable interest which was insured and then assigned, and that in this case it is the wife's interest which was originally insured. But we hold upon the facts in this case that the taking out of the policies in the name of the wife does not alter the principle as to trust funds. The *cestui que trust* is entitled to follow his funds and to take the moneys or the policy at his option.

The case of *Central Bank v. Hume*, 128 U. S. 195, is not in point. The moneys there used were in truth the property of the husband, although he was insolvent, and he used some of his property to purchase insurance for the benefit of his wife and children.

The supreme court held that a policy of insurance taken out by the husband in the name and for the benefit of the wife, made the contract a contract with the wife, and that even though the premiums were paid by the insolvent husband with moneys which, or some part of which, ought to have been used for the payment of his debts, yet if there were no fraud as between the wife and the company, the wife could hold the policy as against the creditors of the husband, except the amount which had been wrongfully used in the payment of premiums. If the amount of the husband's estate used to pay premiums were no more than reasonable and moderate under the circumstances, it was further held that the creditors could not recover back the moneys so paid for them, although the husband was at the time of their payment insolvent. It was said the interest insured did not belong to the husband or his creditors; that the contracts were not payable to the husband, his representatives, or his creditors; that no fraud on the part of the wife, the children, or the insurance company was shown or pretended; and that there was no gift or transfer of the debtor's property, unless the amounts paid for premiums were to be held as excessive.

That is a very different case from the one under consideration. It was no trust fund (within the meaning of that term when used to authorize the following thereof) which went to pay for the policy in that case. The moneys belonged to and were the property of the husband. They might under certain circumstances be reached in proceedings after judgment

and return of execution, but the title was in the husband, and he used his own property to procure the insurance. Having done so, the policy thus procured became a contract with the wife, and her insurable interest in her husband's life was thus made effectual. The creditors could not follow the moneys into other property and demand such property. No principle of following trust funds was involved.

In this case, however, there is the fact which alters and colors the whole transaction, and is fundamental and controlling in its nature, and that fact is that the moneys which procured the insurance were trust moneys, and although invested in the policies, they were subject at the very moment of such investment to the right of the owner of the funds to follow them into whatever change of form they might assume and to claim the thing into which they were changed as if it were the original fund. In the case in the federal court the whole matter was discussed with reference to the violation of the statute of Connecticut, based upon the statute of Elizabeth (13 Eliz., c. 5), prohibiting the transfer of the property of an individual in fraud of his creditors. We have a statute to the same effect: 2 Rev. Stats. 187, sec. 1. The learned chief justice said that the statute was passed to prevent debtors from dealing with their property to the prejudice of their creditors, but dealing with that, which creditors irrespective of such dealing could not have touched, was within neither the letter nor the spirit of the statute. This was spoken of the insurable interest of the wife. And it was spoken in regard to creditors as that term is generally used. In this case it is not in the simple character of a creditor of Mr. Gilman or of the defendant, Mrs. Gilman, that the plaintiff asks relief. He seeks the aid of a court of equity to enable him in the character of a *cestui que trust* to follow his property, which was wrongfully converted by one bearing towards him the obligations of a trustee, and by such trustee invested in these policies, and such *cestui que trust* now asks in substance for his own property, or for the property into which his trust funds were wrongfully converted, and we think he has the right to recover the property which represents and stands in the place of the original trust fund.

The case in the federal court is not at all parallel, and is therefore no authority against our contention. The procurement of policies of insurance by the husband in the wife's name, under the facts developed in this case, does not prevent

the *cestui que trust* from following and claiming the trust funds or their proceeds. If the proceeds of these policies had been greater than the whole amount of the indebtedness of the husband to the *cestui que trust*, arising out of the husband's breach of trust, we do not decide what might in equity be the different rights of the wife and such *cestui que trust* in the balance, or whether any different rule could be logically applied. The husband in this case converted over two hundred thousand dollars of what stood in the nature of a trust fund, and the plaintiff recovers only a little over one fourth thereof in case the judgment on the referee's report be affirmed.

We simply decide the case now before us. As to other questions discussed in the defendant's brief we have carefully considered them, and we think there was no error in the result arrived at by the referee.

The order of the general term is therefore reversed, and the judgment entered upon the report of the referee is affirmed, with costs to the plaintiff at general term and in this court.

TRUST FUNDS, RIGHT TO PURSUE. — This subject is fully treated in the note to *Union Nat. Bank v. Goetz*, 32 Am. St. Rep. 125-130. As to the point that such funds can only be followed as long as they can be identified, see also the more recent cases: *Wetherell v. O'Brien*, 140 Ill. 146; 33 Am. St. Rep. 221; *Mutual Acc. Ass'n v. Jacobs*, 141 Ill. 261; 33 Am. St. Rep. 302.

PARTNERS, FIDUCIARY RELATIONS BETWEEN: See note to *Jones v. Dexter*, 39 Am. Rep. 461, and the following cases in this series: *Morrison v. Blodgett*, 8 N. H. 238; 29 Am. Dec. 653; *Laffan v. Naglee*, 9 Cal. 662; 70 Am. Dec. 678; *Johnson's Appeal*, 115 Pa. St. 129; 2 Am. St. Rep. 539; *Caldwell v. Davis*, 10 Col. 481; 3 Am. St. Rep. 599; *Goldsmith v. Eichold*, 94 Ala. 116; 33 Am. St. Rep. 97. The trust relation which exists between them does not end with the dissolution of the firm, but continues until a final settlement of the partnership affairs: *Filbrun v. Ivers*, 92 Mo. 388.

INSURABLE INTEREST IN ANOTHER'S LIFE: See, generally, notes to *Lord v. Dall*, 7 Am. Dec. 42-44; *Morrell v. Trenton Ins. Co.*, 57 Am. Dec. 93-105; *Continental Life Ins. Co. v. Volger*, 46 Am. Rep. 189-191; *Currier v. Continental Life Ins. Co.*, 52 Am. Rep. 137-148. That the test of the existence of such an interest is, whether there is a reasonable expectation of benefit or advantage from the continuance of the insured life, see *Guardian Mut. Life Ins. Co. v. Hogan*, 80 Ill. 35; 22 Am. Rep. 180; *Keystone Mut. Ben. Ass'n v. Norris*, 115 Pa. St. 446; 2 Am. St. Rep. 572; *United Brethren Mut. Aid Society v. McDonald*, 122 Pa. St. 324; 9 Am. St. Rep. 111.

CASES
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

ARMSTRONG v. BEST.

[113 NORTH CAROLINA, 59.]

MARRIED WOMEN — ABILITY TO CONTRACT. — The common-law disability of a *feme covert* to make a contract exists in North Carolina except in cases provided for by statute.

CONFLICT OF LAWS — CONTRACTS OF MARRIED WOMEN. — When a contract is made by a *feme covert* in one state where it is valid against her, and suit thereon is brought in another state, where she has her domicile and where the contract is void because of her coverture, it will not be enforced in the courts of the latter state.

CONFLICT OF LAWS — CAPACITY TO CONTRACT. — When a contract is valid under the law of the state where it is made, it is valid everywhere as to matters bearing upon its execution, interpretation, and validity; but as to the capacity of the contracting party who resides in another state, the law of his domicile controls and prevails in an action brought in the latter state.

ACTION against Mrs. L. C. Best, wife of N. W. Best, residing and carrying on the business of millinery and merchandise in North Carolina, to recover for goods ordered from and sent to her by the plaintiffs from their place of business in Baltimore, Maryland, and never paid for. Mrs. Best has never been a free trader as required by the North Carolina statute, nor did her husband consent in writing to the purchase of such goods. Judgment for defendants, and plaintiffs appealed.

W. C. Munroe for the appellants.

Allen and Dortch, for the appellees.

SHEPHERD, C. J. If the contract which is the subject of this action was made in this state, it is well settled that it

would be void by reason of the common-law disability of the *feme* defendant to make any contract whatever upon which a personal judgment can be rendered against her, except in the cases provided by statute: *Pippen v. Wesson*, 74 N. C. 437; *Dougherty v. Sprinkle*, 88 N. C. 300; *Baker v. Garris*, 108 N. C. 218; *Flaum v. Wallace*, 103 N. C. 296; *Farthing v. Shields*, 106 N. C. 289.

The plaintiffs, however, insist that the contract was made in the city of Baltimore, Maryland, their place of business, where they accepted the proposal of the defendant by shipping the goods according to her order. In this they are correct, for if a contract is completed in another state "it makes no difference in principle whether the citizen of this state goes in person or sends an agent or writes a letter across the boundary line between the two states": *Milliken v. Pratt*, 125 Mass. 374; 28 Am. Rep. 241. As was said by Lord Lyndhurst: "If I, residing in England, send down my agent to Scotland, and he makes contracts for me there, it is the same as if I myself went there and made them": *Pattison v. Mills*, 1 Dow. & C. 342. So if one in New York orders goods from Boston, "either by a carrier, whom he points out, or in the usual course of trade, this would be a completion, a making of the contract, and it would be a Boston contract whether he gave no note, or a note payable in Boston, or one without express place of payment": 2 Parsons on Contracts, 586.

The contract, then, being a Maryland contract, it is next insisted that it is one which a *feme covert* could have made in that state, and therefore enforceable in the courts of North Carolina. We are by no means certain that the present contract is a valid one according to the laws of Maryland, as the statute of that state seems to recognize the legal capacity of a married woman only to the extent of contracting with reference to property acquired by her "skill, industry, or personal labor." Assuming, however, that it is a valid contract in Maryland, we will proceed to the examination of the question whether it should be enforced by the courts of this state.

It is well settled that the law of one state has *proprio vigore* no force or authority beyond the jurisdiction of its own courts, and that whatever effect is given to it by the courts of foreign countries or other states is the result of that international comity (more properly called private international law) which is the product of modern civilization: *Hornthal v. Burwell*, 109 N. C. 10; 26 Am. St. Rep. 556. It is left to each state or na-

tion to say how far it will recognize this comity, and to what extent it will be permitted to control its own laws. It has, however, been very generally settled that all matters bearing upon the execution, the interpretation, and the validity of a contract are to be determined by the law of the place where the contract is made, and if valid there it is valid everywhere: *Taylor v. Sharp*, 108 N. C. 377. An exception is maintained by some of the continental jurists as to the capacity of a contracting party, and they generally hold that the incapacity of the domicile attaches to and follows the person wherever he may go. We remarked in *Taylor v. Sharp*, 108 N. C. 377, that this was not considered by Mr. Justice Story (*Conflict of Laws*, 103, 104) as the doctrine of the common law, and we also stated the conclusion of Gray, C. J., in *Milliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241, that the general current of the English and American authorities is in favor of holding that a contract, which by the law of the place is recognized as lawfully made by a capable person, is valid everywhere, although the person would not under the law of the domicile be deemed capable of making it. The proposition, though denied by Dr. Wharton as to infants and *femes covert* (*Conflict of Laws*, 112, 118), seems to be generally accepted in this country in so far as it relates to the enforcement of contracts in courts other than those of the domicile. If, for example, the plaintiffs were suing upon the present contract in the courts of Maryland, the defendant could not, it is thought, avail herself of the incapacity of her domicile, but the *lex loci contractus* would prevail. But quite a different question is presented when the action is brought in the forum of the domicile. In such a case, a very important qualification of private international law is to be considered, and this is, that no state or nation will enforce a foreign law which is contrary to its fixed and settled policy. In *Bank of Augusta v. Earle*, 13 Pet. 519, Chief Justice Taney, speaking for the court, said: "The comity thus extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered, and is inadmissible when contrary to its policy, or prejudicial to its interests." To the same effect is the language of Story, — that no state will enforce a foreign law if it be, "repugnant to its policy or prejudicial to its interests"; *Conflict of Laws*, 37. That this qualifying principle is applicable to cases like the present, is manifest, not only by reason and necessity, but also by the decisions of other courts. Even

in *Milliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241, in which the *lex loci contractus* is pushed to the extreme limit, it is suggested that where the incapacity of a married woman is the settled policy of the state, "for the protection of its own citizens, it could not be held by the courts of that state to yield to the law of another state in which she might undertake to contract."

In *Robinson v. Queen*, 87 Tenn. 445, 10 Am. St. Rep. 690, the contract was made by the *feme* defendant in Kentucky, where she resided and under whose laws she was capable of contracting. An action was brought in Tennessee, and the court held, as we did in the similar cases of *Taylor v. Sharp*, 108 N. C. 377, and *Wood v. Wheeler*, 111 N. C. 231, that the plaintiff was entitled to recover. The court, however, said: "If this were a suit against a married woman, a citizen of this state, on a contract made out of the state, there would be much force in the insistance of the defendant."

In *Johnston v. Gawtry*, 11 Mo. App. 322, it was held that where a married woman, having a separate estate in land in Missouri, makes a contract in another state, her capacity to make the contract and its validity are to be determined by the law of Missouri, in a suit in a Missouri court to enforce such contract.

In *Bank of Louisiana v. Williams*, 46 Miss. 618, 12 Am. Rep. 819, the contract was made in Louisiana, where it would have been valid against the *feme* defendant. The suit was brought in Mississippi, the place of her domicile, and under whose laws the contract was void by reason of her coverture. The opinion of the court is very elaborate, and, although the special character of the Louisiana law is referred to, it is believed that its reasoning is of general application. The court said: "It is the prerogative of the sovereignty of every country to define the conditions of its members, not merely its resident inhabitants, but others temporarily there, as to capacity and incapacity. But capacity or incapacity, as to acts done in a foreign country where the person may be temporarily, will be recognized as valid or not in the forum of his domicile, as they may infringe or not its interests, laws, and policies." After speaking of the separate estate of the wife and the statutes prescribing how it may be charged, the court, referring to the foreign plaintiff, says: "But he must satisfy the court that his debt was such a charge upon her estate, or its income, as she had the power to make; otherwise, it would be

a violation of the tenure, the conditions of her title, to allow him to subject it. But the creditor may say, 'I cannot bring this debt within the terms defined by your law; nevertheless, it was such a contract as a married woman could make by the law of Louisiana. Comity requires your courts to treat the contract precisely as Louisiana would, and I demand a judgment against the wife.' 'No,' says the court, 'you cannot get here any fruit of a judgment; there is nothing subject to its payment, and our law affords no remedy against a married woman in any of its courts, law or equity, except through a property which she has, and which must be pointed out by the creditor. We know of no such thing as a personal obligation, aside from and independent of a property which may discharge it.'"

In North Carolina it has been conclusively determined that the common-law disability of a *feme covert* still obtains, and that, except in the cases provided by statute, her promise, as was said by Ruffin, J., is "as void as it ever was, with no power in any court to proceed to judgment against her *in personam*": *Dougherty v. Sprinkle*, 88 N. C. 300. The constitution and laws made in pursuance thereof protect her separate estate and prescribe the manner in which she may dispose of or charge it, and the assent of the husband is generally necessary.

This brief reference to our laws in respect to married women is sufficient to show that the enforcement of the present contract is wholly repugnant to our domestic policy, as well as prejudicial to the interests of our citizens. It is not pretended that the defendant has attempted to charge her separate estate in any manner provided by our laws, and to hold that she may subject it to execution upon a personal judgment by reason of a promise made during a short visit to another state, or, as in this case, by a simple order for goods, would afford an easy method of charging her property in contravention of the public policy and laws of the domicile. It is further to be observed that in North Carolina, as a general rule, the written assent of the husband is necessary in order to give any effect whatever to her obligations, yet this wholesome provision may easily be evaded, even in the very presence of the husband and despite his protest, by a simple correspondence by the wife with parties in another state, which may technically amount to a foreign contract. In this way she could indirectly dispose of or charge all of her real or personal

property, entirely freed from the restraint of her husband, or the methods prescribed by the *lex rei situs*. We cannot assent to the proposition that a foreign law, thus introduced and so utterly subversive of the laws regulating a large amount of property within the limits of this state, will be recognized and enforced by our courts.

The courts of our state have perfect jurisdiction over all personal and real property within its limits belonging to the wife, and if our laws in respect to the manner in which it may be charged conflict with those of another state, it cannot be made a question in our own courts as to which shall prevail. It is certainly competent for any state to adopt laws to protect its own property as well as to regulate it, and "no nation," says Story, "will suffer the laws of another to interfere with her own to the injury of her citizens. That whether they do or not must depend on the condition of the country in which the foreign law is sought to be enforced, the particular nature of her legislation, her policy, and the character of her institutions. . . . That whenever a doubt does exist, the court which decides will prefer the laws of its own country to that of the stranger": *Conflict of Laws*, 28.

For the reasons given, we cannot recognize the present contract as an enforceable one in our courts.

We think his honor was correct in his ruling that the plaintiffs were not entitled to recover.

Affirmed.

HUSBAND AND WIFE — POWER OF WIFE TO CONTRACT UNDER AMERICAN STATUTES: See note to *Kautrowitz v. Prather*, 99 Am. Dec. 598-610.

CONFLICT OF LAWS — LEX LOCI CONTRACTUS. — The obligation of contracts and capacity of the parties thereto are to be determined by the *lex loci contractus*, unless there is something in the contract which is deemed hurtful to the good morals or injurious to the rights of the citizens of the state in which it is sought to enforce the contract: *Robinson v. Queen*, 87 Tenn. 445; 10 Am. St. Rep. 690; *Sondheim v. Gilbert*, 117 Ind. 71; 10 Am. St. Rep. 23; *Forepaugh v. Delaware etc. R. R. Co.*, 128 Pa. St. 217; 15 Am. St. Rep. 672; *Brown v. Browning*, 15 R. I. 422; 2 Am. St. Rep. 908. That a contract made in one state, where it is valid, will be enforced in another, where it is against public policy and void, unless it is also illegal and immoral, was held in *Fonseca v. Cunard Steamship Co.*, 153 Mass. 553; 25 Am. St. Rep. 660; while in *Wasserbocker v. Boulier*, 84 Me. 165, 30 Am. St. Rep. 344, the rule is said to be that "no state is bound to recognize or enforce contracts which are injurious to its own interests, or the welfare of its people, or which are in fraud or violation of its own laws."

TOOLE v. TOOLE.

[112 NORTH CAROLINA, 182.]

DIVORCE — CONFIDENTIAL COMMUNICATIONS — ADULTERY. — On the trial of an action for divorce *a vinculo*, the adultery alleged cannot be shown either by the direct testimony of the parties, nor the confession of husband or wife made to each other, nor by admissions in the pleadings.

DIVORCE — EVIDENCE — DECLARATIONS OF PARAMOUR. — In an action for divorce *a vinculo* on the ground of adultery by the wife, the declarations of her alleged paramour, made to or in her presence, indicating that improper familiarities have been or are about to be indulged in between them, and her reply to such declarations, are not privileged communications, and are admissible in evidence.

DIVORCE — EVIDENCE — DECLARATION BY HUSBAND. — In an action for divorce on the ground of adultery of the wife, a declaration made by the husband to his wife that, "I have told you before, and I tell you again, I don't want to catch Palmer (the alleged paramour) at my house any more," is admissible in evidence when coming from a witness in whose presence it was made, and who has testified to improper conduct between the wife and such alleged paramour. Such declaration is not a confidential or privileged communication between husband and wife, but is a command made in the presence of a third person.

DIVORCE — EVIDENCE — DECLARATIONS OF WIFE. — In an action for divorce on the ground of the adultery of the wife, the testimony of a third party as to the request of the wife to be allowed to pay the costs of a prosecution against her alleged paramour, is admissible, not as a confession of her guilt, but as a circumstance tending to show her interest in and association with him, and to corroborate other testimony as to adulterous intercourse between the parties.

ACTION for divorce. On the trial one Laura Webb was allowed to testify against objection to a conversation between one Palmer and the defendant, in which Palmer, her alleged paramour, said: "When I was in Florida, you sent for me to come back; now you have gone back on me for another man; you have something of mine that cost five dollars, and I want it." To which defendant answered: "I have misplaced it; go away." To which Palmer replied: "You are a liar; it is in that house, and I want it; you have gone back on me for another man." The other facts appear from the opinion. Decree of divorce in favor of plaintiff and defendant appealed.

Jones and Tillett, for the appellant.

P. D. Walker, for the appellee.

AVERY, J. On the trial of actions for divorce *a vinculo matrimonii* the adultery alleged cannot be shown either by the direct testimony of the parties or confession of husband or wife made to each other or admissions in the pleadings:

Code, sec. 1288; *Steel v. Steel*, 104 N. C. 631; but the declarations of an alleged paramour, made to or in the presence of the *feme* defendant, indicating that improper familiarities had been or were about to be indulged in between them, and her reply to such declarations, fall neither within the prohibition of the statute nor the reason of the rule, and are therefore clearly competent: *Hansley v. Hansley*, 10 Ired. 506; *Brown on Divorce*, 59; *Pond v. Pond*, 132 Mass. 219; 2 *Bishop on Marriage and Divorce*, 1417. The conversation between Palmer and the defendant from its very nature precluded the possibility that it was conceived in any collusive arrangement between the parties, and, "the policy of the law, as affirmed in the express provision of the statute, is to exclude confidential communications between husband and wife, as privileged, and any declaration by either that apparently may have originated in a conspiracy between them to manufacture or furnish evidence sufficient to warrant a decree of divorce": *Perkins v. Perkins*, 88 N. C. 41. But where there is no danger of opening the door for collusive testimony, such suspicious conversations with an alleged paramour are clearly competent, especially in corroboration of other circumstantial testimony, or in connection with other direct evidence tending to prove adulterous intercourse with the paramour. The unwarranted familiarity between the defendant and Palmer which is shown by the conversation tends to prove that improper relations had existed between them, and to corroborate other testimony as to criminal intercourse: 2 *Bishop on Marriage and Divorce*, sec. 1374.

Confidential communications between husband and wife are privileged and neither is compelled to divulge them upon the witness stand; but the testimony of Lillie Graham that she saw Palmer in the bedroom of the defendant, and at the trestle in company with her, was competent in itself, and when considered in connection with the previous declaration of the plaintiff made to defendant in presence of the witness, her disregard of his express wishes becomes material because it makes her conduct appear much more suspicious. The language used by the husband about a week before, viz., "Laura, I have told you before, and tell you again, I don't want to catch Palmer at my house any more," was not a confidential communication between husband and wife, but a command uttered in the presence of another, the disregard of which tended to prove her infatuation for Palmer. If, then

we should concede that confidential communications between husband and wife are not simply privileged as to them, but cannot be proven even by a third person, and though neither husband nor wife is competent or compellable to testify directly as to the adulterous acts charged, according to a proper interpretation of the statute (Code, sec. 588) this was not such a communication, and being offered in connection with her conduct and proven by a third person was competent. But similar testimony was declared, when this case was heard on the former appeal (*Toole v. Toole*, 109 N. C. 615) to be competent as tending to show adulterous intercourse as well as for the purpose of contradicting the witness, who testified that plaintiff had employed Palmer to stay with his family. It is therefore needless to discuss this point at greater length.

If the testimony of Webb was incompetent, the error in admitting it was cured by withdrawing it from the jury, and giving them the proper caution not to be influenced by it in making up their verdict: *Gilbert v. James*, 86 N. C. 244; *McAllister v. McAllister*, 12 Ired. 184; *Osborne v. Wilkes*, 108 N. C. 651. From the statement of the case on appeal it appears that the objection to the testimony of Morris was withdrawn, though the exception to its admission seems to have been assigned, and to be now insisted on as error. It is not material, however, whether it can be insisted on or not. The request of the defendant to be allowed to pay the costs of a prosecution against Palmer was in no sense a confession of her guilt. It was but a circumstance tending to show interest in him, and association with him, and to corroborate other testimony as to adulterous intercourse between the parties: *Hansley v. Hansley*, 10 Ired. 506.

The statute protects the sanctity of the relation by preventing the disclosure of confidential communications between husband and wife, and all confessions of guilt by the parties are looked upon with suspicion, because of the temptation to resort to collusion, when, as is frequently the case, both parties desire to be released from the contract. But a different question is presented when the declaration of a *particeps criminis* to the accused party, and the conversation growing out of it, though amounting to an admission of criminality, is offered, or when a command of a husband to a wife is proved by a third party in connection with evidence of her disregard of such command at the instance of an alleged paramour.

Whether, under our statutes now in force, admissions of guilt by either husband or wife, made to a third person, and under such circumstances as to preclude the suspicion of collusion, would in any case be competent, when disconnected with other evidence of familiarity or improper association, it is not necessary to determine.

For the reasons given we think that there was no error.

DIVORCE, ADMISSION OF THE TESTIMONY OF THE SPOUSES IN ACTIONS FOR.—Admissions or confessions of the defendant, made either in the pleadings or otherwise, are not sufficient when unsupported by other testimony to establish the fact of adultery in an action for divorce: *Richardson v. Richardson*, 4 Port. 467; 30 Am. Dec. 538; *Miller v. Miller*, 1 Green Ch. 139; 32 Am. Dec. 417; *Matchin v. Matchin*, 6 Pa. St. 332; 47 Am. Dec. 466. Where the direct testimony of the parties is admitted, the testimony of the plaintiff cannot be sufficiently corroborated by proof of any admission of the defendant: *Scarborough v. Scarborough*, 54 Ark. 20; and under a code providing that, "no divorce shall be granted upon the uncorroborated statement, admission, or testimony of the parties," it has been held that the testimony of the plaintiff need not be corroborated as to every fact or circumstance, but that it is enough if the facts corroborated are sufficient to support the action and justify entry of a decree in the plaintiff's favor: *Cooper v. Cooper*, 83 Cal. 45. Compare *Lee v. Lee*, 3 Wash. 236. The provision of the North Carolina Code regarding the nonadmissibility of the declarations of husband and wife in actions for divorce for adultery are not contravened by allowing the plaintiff (the husband) to ask a witness on cross-examination if "she did not hear the plaintiff, before that day, forbid the defendant to go with P. [with whom the adultery was alleged to have been committed], or to go where he was." Such evidence is proper, both as tending to show the adulterous intercourse, and thus to contradict a former witness, who testified that the plaintiff had invited P. to his house, and as sustaining the plaintiff's allegation that the adulterous intercourse was without the consent or connivance of the plaintiff: *Toole v. Toole*, 109 N. C. 615.

DIVORCE, EVIDENCE OF DECLARATIONS OF THE PARAMOUR IN ACTIONS FOR.—A confession of adultery by the alleged paramour of the wife, not communicated to her, is not evidence against her in an action for divorce: *Matchin v. Matchin*, 6 Pa. St. 332; 47 Am. Dec. 466. Nor is it proper to admit in evidence letters written by him, but not known to nor received by the wife, although they contain a confession of guilt on his part: *Tillison v. Tillison*, 63 Vt. 411. But if such letters have been received by her, and the wife, when called as a witness on her own behalf, and advised by competent counsel, fails to deny knowledge of the letters, or to contradict any of the husband's statements with reference to them, the statements contained in the letters, so far as they allege acts and mental condition of the wife, will be regarded as admissions by her: *Stickle v. Stickle*, 48 N. J. Eq. 336.

COMMUNICATIONS BETWEEN HUSBAND AND WIFE IN THE PRESENCE OF A THIRD PERSON, WHETHER PRIVILEGED: See note to *Commonwealth v. Sapp*, 29 Am. St. Rep. 413. A later case to the point that such communications are not confidential is *Troy Fertilizer Co. v. Logan*, 90 Ala. 325.

VANSTORY v. THORNTON.

[112 NORTH CAROLINA, 196.]

JUDGMENTS — PAYMENT AND SATISFACTION. — When a receiver, appointed at the request of a judgment debtor, fails to pay a judgment creditor an amount ordered by the court to be paid to him, and such failure is without the fault or negligence of the judgment creditor, the judgment debtor cannot claim payment on the judgment to the amount ordered paid, and the loss must fall on him individually.

HOMESTEADS — LIEN OF JUDGMENT AGAINST. — Under the North Carolina statute, a docketed judgment is a lien on all the land of the debtor in the county where it is docketed from the date of the docketing, and the creditor may immediately enforce such lien on all of the debtor's land outside of the boundaries of his homestead; but as to such homestead estate, he cannot subject it to his lien until the homestead right therein is in some manner terminated.

HOMESTEAD — JUDGMENT AND MORTGAGE LIENS AGAINST — DISTRIBUTION OF PROCEEDS OF SALE. — When a judgment debtor, after the judgment is docketed, mortgages all of his lands, including his homestead, and they are sold under the judgment, the excess above the homestead exemption will be applied in payment of the judgment lien; but the homestead right passes to the mortgagee, and the judgment debtor is not entitled to any portion of the amount of the homestead exemption until both the judgment and the mortgage are paid, and such amount will be invested under the direction of the court until the termination of the homestead right, and the interest thereon applied to the mortgage. Upon the termination of such right, the principal will be applied: 1. To any balance remaining unpaid on the judgment; and 2. To the balance, if any, due on the mortgage, the remainder, if any, to go to the judgment debtor.

HOMESTEADS — SALE OF — LIEN OF JUDGMENT. — The homestead right is salable or assignable, and the purchaser can hold the land to which it attaches to the exclusion of an ordinary senior judgment creditor of his assignor or vendor until such right is in some manner terminated and extinguished.

HOMESTEADS — LIEN OF JUDGMENT AGAINST. — Under the North Carolina statute, which makes a docketed judgment a lien on all the lands of the debtor in the county where it is docketed from the date of docketing, the lien of a docketed judgment has priority over the lien of a subsequent mortgage on a homestead of the debtor as soon as the homestead right has terminated or become extinguished.

ACTION to determine the priority of certain liens against a homestead and other property, and for the distribution of the proceeds of a sale thereof. The defendant Thornton and one Lambeth were partners. The former brought an action against the latter to close up such partnership. In this action, the plaintiff, Vanstory, being a creditor of the firm, was made a party defendant, and recovered a judgment against the firm for nine hundred seventy-eight dollars and

twenty cents, which was duly docketed. In the same action, Thornton recovered judgment against Lambeth for five hundred ninety-five dollars and fifty-six cents. One McQueen was then appointed receiver in the case to take charge of and collect the partnership effects, and to pay the proceeds to Vanstory to the amount of his judgment and costs. McQueen died without complying with the order of the court, and Vanstory received no part of such partnership assets, nor has he received anything under an execution issued upon his judgment. Thornton contended in the present action that the partnership assets, to the amount of five hundred seventy-five dollars and seventy-five cents, collected by McQueen before his death, constituted a satisfaction of the Vanstory judgment *pro tanto*, and also exonerated his property from its payment to that extent. Subsequently to the rendition and docketing of the Vanstory judgment, Thornton executed mortgages on all his property to different mortgagees at different times. In the present action, to subject such property to the payment of such judgment, the defendant Thornton claimed property consisting of a house and city lot as his homestead, and his mortgagees were allowed to come in and be made parties defendant, and they adopted the answer of Thornton. Upon the close of the trial, the court rendered the following judgment: "This cause having been brought to a trial before the judge and a jury at the present term, and the jury having found that the house and lot in Fayetteville, claimed as a homestead by the defendant, is worth more than one thousand dollars in value, it is considered and adjudged by the court that said property be exposed to public sale by commissioners hereinafter appointed by the court, for cash, the homesteader electing cash instead of land, after four weeks' advertisement in the Fayetteville Observer, at the court-house door in Fayetteville, who shall apply the proceeds of sale to the payments of the debts of the defendant A. G. Thornton, as mentioned in the pleadings, in the following order of priority: 1. The different mortgage debts according to the different dates and priorities of the mortgages securing them; 2. After payment of the foregoing mortgage debts, the commissioners shall reserve for the defendant, A. G. Thornton, his homestead interest to the amount of one thousand dollars, should there be so much left, the annual interest upon which sum to be paid to him during life, and to his widow, should his wife survive him, during her life and the

minority of their youngest child; 3. The judgment of plaintiff against the defendant, docketed May 6, 1889, for nine hundred seventy-eight dollars and twenty cents, with interest from April 1, 1887, and costs thereon, fourteen dollars, should there be so much left; 4. The residue, if any, to be paid to defendant." From this judgment, the plaintiff appealed.

T. H. Sutton, for the appellant.

R. P. Buxton, for the appellee.

BURWELL, J. This case comes to us upon the appeal of the plaintiff, who is the judgment creditor, and of the defendant Thornton, who is the judgment debtor. The mortgagees, who have come into the action of their own motion, since it was last before the court (110 N. C. 10), and have been made defendants and have adopted the answer of the defendant Thornton, did not appeal.

We will first consider the refusal of his honor to submit the issue tendered by Thornton relative to the alleged payment, in whole or part, of plaintiff's judgment.

This issue was tendered by him with the evidence which he insisted tended to establish that such payment had been made. He did not contend that he could produce other evidence bearing upon it. It would have been an idle thing to submit such an issue, the burden of which was upon defendant, and at the same time tell the jury that defendant had no evidence to support it.

And his honor correctly decided that the facts put in evidence did not prove that any payment had been made on the judgment, or that it had been satisfied in whole or in part. There was no offer to prove that plaintiff had actually received from the receiver in *Thornton v. Lambeth*, 103 N. C. 86, any money to be applied on this judgment, or that his failure to get it was due to his own fault or negligence. That receiver was appointed at the instance of the defendant to take charge of the partnership assets (*Thornton v. Lambeth*, 103 N. C. 86), and if, without any neglect on his part, the plaintiff failed to get what the judgment of the court in that cause directed the receiver to pay him, the loss must fall on the defendant (the plaintiff there), whose duty it was to see that the money he owed was in fact paid.

The amount due to plaintiff on his judgment being thus fixed, we come to the consideration of his exception to the

judgment, which is as follows: "To this judgment the plaintiff, C. P. Vanstory, excepted, claiming that after the payment of costs his judgment for nine hundred seventy-eight dollars and twenty cents, with interest from April 1, 1887, docketed May 6, 1889, was entitled to priority over all the mortgage debts, being older, and should be paid in full before any of the proceeds of sale should be applied to any of said mortgages."

And in this connection we will also consider the defendant's exception to this judgment, "claiming that after the payment of the costs and mortgage debts, no part of the fund arising from the sale of his homestead should be paid to the plaintiff, but the balance should be paid to him."

The land, a sale of which is ordered by the judgment appealed from, was allotted to the defendant Thornton as his homestead in April, 1885. The relief which the plaintiff demands is that, for reasons set out in his complaint, there should be, "a reappraisement and reallocation of the land and improvements of the defendant, to the end that the excess of the homestead, if any, be ascertained, and be subjected to the satisfaction of plaintiff's judgment."

It seems to have been conceded by the eminent counsel of the defendant that under the law as declared when this cause was here on demurrer (*Vanstory v. Thornton*, 110 N. C. 10), and the allegations of the complaint and answer, and the findings of the jury, the plaintiff was entitled to have the reappraisement and reallocation demanded by him. We wish, however, to expressly exclude the conclusion that a reallocation should be decreed in suits like this one, upon the finding of the jury that the allotted land is worth "more than a homestead"; that is to say, more than one thousand dollars. To accomplish that result, much more must be established by the plaintiff, according to the opinion filed by the late Chief Justice Merrimon in this cause, *Vanstory v. Thornton*, 110 N. C. 10, to which we adhere.

Assuming, then, that the parties to this action (which, by the presence of the defendant mortgagees, has become a suit to foreclose their mortgages as well as to reappraise and reallocate the homestead upon the demand of the plaintiff, and for the reasons set out in his complaint) have consented that a sale of the whole lot shall be made, the purchaser acquiring a title free from all of their claims or liens, and that their respective claims to the fund to be brought into

court, the proceeds of the sale shall be measured and determined by their respective claims and liens on the land, we are required to determine how that fund shall be distributed.

This agreement, or concession, of the parties, that a sale of the whole lot shall be made without a reallocation of the homestead of Thornton, involves, of course, the further concession or agreement that what the lot brings over one thousand dollars shall represent what the excess over the homestead would have brought if the homestead had been reallocated, and the excess had then been sold, and it also involves the further concession or agreement that the reallocated homestead would have sold for one thousand dollars.

If, therefore, after the payment of the costs (to the payment of which, first, no party excepts) there shall remain more than one thousand dollars, that excess will represent and stand in the place of the portion of the lot which, upon a reappraisement, would lie outside of the homestead boundaries, and this excess of the fund over one thousand dollars (the homestead) must be applied on the plaintiff's judgment, for it was docketed before any of the mortgages were registered, and it is a first lien on this excess (*Gulley v. Thurston*, 112 N. C. 192), enforceable now because of the reallocation of defendant's homestead. The statute (Code, sec. 435) makes a docketed judgment a lien on all the land of the debtor in the county where it is docketed from the date of the docketing, and the creditor may immediately enforce his lien so acquired on all the debtor's land outside of the boundaries of the homestead. Such are his rights. They are plain and unmistakable. No act of the debtor can change them, or in any degree impair them. To hold otherwise would be to displace, by our decision, a lien given by the statute, and to put it in the power of a judgment debtor to deprive his diligent creditor of the fruits of his diligence.

We hold, of course, that if, after the full payment of plaintiff's judgment, any part of this excess shall remain, it shall be applied on the mortgage debts according to their priorities.

This brings us to determine what disposition shall then be made of the homestead money, the sum which represents and stands in the place of the newly allotted homestead, and to which none of the parties waive any of their claims or modify in any degree their legal rights.

We must first discuss the relation of the plaintiff to this

fund, for it may be that the excess over one thousand dollars will not be sufficient to pay all costs and his judgment.

In some states a docketed judgment creates no lien on the homestead land, but in this state such a judgment creates a lien on all the land of the debtor, both that outside of the homestead boundaries and that within those boundaries, the only difference being that the lien on that which is within the homestead boundaries is not enforceable by execution or other final process until there has come about in some way a termination of the debtor's constitutional exemption rights in this land, which rights, vested in him by the organic law, may be prolonged after his death for the benefit of his widow in some instances and in some for the benefit of infant children. As we have said, he cannot now enforce his lien on the homestead land, but his debtor cannot displace that lien by any act of his. It is fixed on the land by law, and this court can only recognize and at the proper time enforce it.

We conclude, therefore, that the plaintiff has a lien on this fund (one thousand dollars) for the payment of such part of his judgment as is not satisfied by the excess over the homestead money, but if the other parties interested in this fund so insist, he must await the termination of Thornton's exemption rights in this fund before he can get for his own use any part of it. When those rights have terminated, such part of this principal fund as may be necessary will be applied to the satisfaction of the plaintiff's judgment. In the mean time it will be invested as the superior court of Cumberland County may direct, and the interest accruing thereon will be applied on the mortgage debts, paying the senior mortgage first and then the next oldest, and so on. Any remainder of the *corpus* after satisfaction of the judgment will be used to pay off any balance then due on the mortgage indebtedness. The defendant Thornton can have no part of this fund until both the judgment and the mortgages are paid off in full. He loses the land outside of his reallocated homestead because it must be devoted to the discharge of the judgment lien thereon. He loses his right to use the homestead land or the money that stands in its place, because by proper deeds he and his wife have assigned that land to the mortgagees; thereby they acquired all his rights to this lot, his homestead estate therein, as it is sometimes called: *Adrian v. Shaw*, 82 N. C. 474; *Simpson v. Houston*, 97 N. C. 344; 2 Am. St. Rep. 297. Therefore they take his place in relation to the fund

(one thousand dollars), which stands in lieu of the exempt land, and must be allowed to hold that place to the present exclusion of the judgment creditor.

We feel bound to follow the decisions cited above and others of like import made by our distinguished predecessors, because rights have been acquired and contracts have been made on the faith of those adjudications. To disturb them at this late day would bring about confusion and cause injustice in many instances. We prefer to recall the *dicta* in *Fleming v. Graham*, 110 N. C. 374, which seem in conflict with those older cases.

We are not unmindful of the fact that perplexing problems will arise in the adjudication of rights in and titles to lands, to which, at one time or another, there has attached that peculiar right called a "homestead," whether we adhere to the old rule laid down in *Adrian v. Shaw*, 82 N. C. 474, and cases of like import, or adopt the new rule foreshadowed in *Fleming v. Graham*, 110 N. C. 374. One thing, at least, should be distinctly realized: The two rules, on principle, are in direct conflict one with the other. By the one the homestead right, or estate, or exemption from execution, or "advantage," call it by what name we will, is salable or assignable, and the purchaser can hold the land in which he has acquired this right or estate, or exemption from execution, or advantage, to the exclusion of the ordinary judgment creditor of his assignor or seller till that right, or estate, or advantage, or exemption from execution, "is over." By virtue of the assignment (usually made in the form of a deed to the land itself, the greater including the less) he gets into the shoes of the homesteader, to use a homely expression. He has bought the privilege of so standing, the privilege of personating before the law and the judgment creditor the "homesteader" himself, *quoad* the homestead land. And we think that the assignability of this right, as contradistinguished from the land itself, has been distinctly recognized by all the decisions of this court until that of *Fleming v. Graham*, 110 N. C. 374. It is true that there has been much discussion as to the name that should be applied to this new creation of the law. Justice Dick called it, in *Poe v. Hardie*, 65 N. C. 447, "the estate in the homestead," "a determinable fee," and called its counterpart, "the reversionary interest," the two constituting all the estate of the owner of the land. Chief Justice Pearson called it, "the homestead estate," and its counterpart

"the reversion," and notably in *Jenkins v. Bobbitt*, 77 N. C. 885, though in *Littlejohn v. Egerton*, 77 N. C. 384, he had spoken of the "homestead right" as a quality annexed to land whereby an estate is exempted from sale under execution for debt. Justice Bynum, in *Citizens' Nat. Bank v. Green*, 78 N. C. 247, defined it as "no new estate," but only "a determinable exemption from the payment of his debts in respect to the particular property allotted to him." And the same court, in *Hill v. Oxendine*, 79 N. C. 331, distinctly recognized the "homestead" as distinguished from the "reversionary interest," and with equal distinctness conceded the assignability of each of these rights or interests separately.

Chief Justice Smith, in *Markham v. Hicks*, 90 N. C. 204, approved the definition or description contained in *Citizens' Nat. Bank v. Green*, 78 N. C. 247, and called attention to the "inadvertent expressions" which had been used in defining the right under discussion; but there was no intimation from him in that case that it was not assignable.

Chief Justice Merrimon, in the case of *Jones v. Britton*, 102 N. C. 169, speaks of this quality of exemption as an "advantage" which can pass by proper deed from the homesteader to his vendee of the land, and in unmistakable language recognizes that this "advantage"—this exemption from sale, limited contingently—may be acquired and held by the vendee of the land to the postponement of the rights of the judgment creditor. He there emphatically approved the rule laid down in *Adrian v. Shaw*, 82 N. C. 474, by Justice Ashe, which had been approved with even greater emphasis by Chief Justice Smith on the rehearing of the latter case (*Adrian v. Shaw*, 84 N. C. 832).

And in *Lane v. Richardson*, 104 N. C. 642, it is said of homestead land that had been sold by the homesteader that it, "retained the quality of the homestead exemption in the hands of the purchaser." In *Long v. Walker*, 105 N. C. 90, the cases of *Wyche v. Wyche*, 85 N. C. 96; *Barrett v. Richardson*, 76 N. C. 429, and *Lowdermilk v. Corpening*, 92 N. C. 333, are cited with approval, and the principal that in this state what is there again called the "reversionary interest" in the homestead land may be owned by one person while the homestead interest or estate is held by another, is distinctly recognized.

In *Waples on Homestead and Exemption*, p. 299, it is said: "There may be a suspended judgment lien on a home-

stead; as when the statute allows judgments to be docketed against it but prevents their enforcement during the time the homestead remains exempt, yet allows execution afterwards. Meanwhile, the exemptionist may sell the land on which the benefit rests, subject to the judgment but also protected for the time being by the suspension of the lien. The purchaser acquires this protection with the land so far as the homestead extends with the land." In support of this the learned author cites: *Jones v. Britton*, 102 N. C. 166; *Rankin v. Shaw*, 94 N. C. 405; *Markham v. Hicks*, 90 N. C. 204; *Wilson v. Patton*, 87 N. C. 818, and *Hinson v. Adrian*, 86 N. C. 61.

It is not our privilege to consider the choice between these two rules (that of *Adrian v. Shaw*, 82 N. C. 474, and *Jones v. Britton*, 102 N. C. 166, establishing the assignability of the homestead estate or right, or advantage, and the one proposed in *Fleming v. Graham*, 110 N. C. 374, denying that assignability) as a new question. If such was the case we might find much perplexity in the consideration of the constitution, which seems to provide for a sale by the homesteader and his wife of the homestead lands, and the statute law, and the decisions of this court, which beyond all question make a docketed judgment a lien on the homestead land, a provision that is in force in few of the states except this. It may be said in this connection, however, that it would be difficult for one to see what value or efficacy there would be in a power of sale, if the exercise of the power brought to the purchaser only the poor privilege of witnessing an execution sale of his newly acquired land. And in truth it matters not so much what we call, as how we protect and enforce this "right" or "estate." It may be that inadvertent expressions have been used in the effort to adapt the nomenclature of the common law to a matter unknown to that system of jurisprudence. But through all the decisions of this court down to the case of *Fleming v. Graham*, 110 N. C. 374, will be found, we think, upon careful examination, a clear recognition of the fact that this "advantage," as Chief Justice Merrimon aptly called it, is assignable, and that the purchaser of the land from the homesteader may hold that "advantage." Therefore when we affirm *Adrian v. Shaw*, 82 N. C. 474; *Simpson v. Houston*, 97 N. C. 344; 2 Am. St. Rep. 297, and cases of like import, we are but affirming *Jones v. Britton*, 102 N. C. 166, decided so late as 1889, and, as we think, we go counter to no decis-

ion or *dictum* in the reports of the decisions of this court, except what is said in *Fleming v. Graham*, 110 N. C. 374.

If there is to be any present division of this fund between the parties, it must be a matter of arbitration or agreement among themselves, for the courts have no rule by which to determine what exemption rights are worth in cash, their present value, the length of their duration depending on too many contingencies.

The case of *Leak v. Gay*, 107 N. C. 468, so far as it decides or seems to decide that the lien of a docketed judgment on the debtor's land, whether on an allotted homestead or not, can be displaced by a junior mortgage, is overruled.

The fund arising from a sale of the lot described in the pleadings must be disposed of in accordance with this opinion, unless otherwise agreed by all the parties in interest.

Judgment modified. In plaintiff's appeal there is error. In defendant's appeal there is no error.

MR. JUSTICE CLARK dissented, and contended that there is a distinction between a homestead and a homestead right; that the former is the lot of land exempted from forced sale, while the latter is the right to have it exempted, and to use and occupy it free from molestation. The former may be conveyed with the consent of the wife and privy examination; the latter cannot be conveyed, nor does it pass by a conveyance of the land, for it is not property, but a personal privilege, extending in some cases to the minority of the children and to the widow. "It seems that North Carolina is the only state in which it has ever at any time been held that a conveyance by the debtor of the homestead right carried with it an assignment of the homestead: *Waples on Homestead*, 327, note 5, and 374, note 4; *Brame v. Craig*, 12 Bush, 404. And upon the plain language of the constitution, upon the weight of our own later decisions, and the reason of the thing, it is difficult to see how the assignability of the homestead right can be maintained here. Concurring, as I do, as to the rest of the opinion, I must, therefore dissent from so much of it as holds that, as to the proceeds of the sale under a mortgage of the homestead, the lien of a prior docketed judgment is displaced in favor of the mortgagees under the subsequently executed mortgages during the life of the homesteader." The constitutional provisions which create the homestead also authorize the conveyance of the lot over which the homestead exemption has been extended, and not the homestead exemption itself, which is a right personal to the debtor, and not capable of alienation. "When the homestead is conveyed, the grant is only of the lot which has been sheltered from execution so long as it was 'owned and occupied' by him. It passes by his conveyance out from under such shelter, and becomes liable to any lien which would have been enforced against it but for the exemption which he waived by the conveyance. The homesteader does not and cannot part with his constitutional right to claim a homestead exemption from execution. He can, immediately after the conveyance of the homestead lot, spread its protecting agis over any other lot owned and occupied by him." Whenever the claimant ceases to "own or

occupy" a lot, it ceases to be entitled to the exemption from execution. The constitutional requisite is gone. He may occupy it by a tenant, for the tenant's occupancy is his; but when by deed, with his wife's privy examination, he conveys it away, the grantee gets the grantor's whole interest, subject to liens, but without exemption from execution, which exists only in favor of the owner and occupier of the lot. He does not "own or occupy" it after the conveyance to another. When the homestead claimant ceases to be a resident of the state, the right of exemption ceases, even though he leaves his wife and children therein: *Finley v. Saunders*, 98 N. C. 462; *Baker v. Legget*, 98 N. C. 304; *Munde v. Cassidy*, 98 N. C. 558; *Lee v. Moseley*, 101 N. C. 311; or when, by reason of the improvements he shall have placed upon the homestead, or from other cause, the value thereof shall exceed the constitutional limit of one thousand dollars, the exemption ceases as to the excess, and there may be a reallocation: *Vanstory v. Thornton*, 110 N. C. 10; Stats. of North Carolina, 1893, c. 149, p. 111. The ruling in *Adrian v. Shaw*, 82 N. C. 474, 84 N. C. 832, that the homestead right was an estate in the lot, has been overruled in several cases: *Hughes v. Hodges*, 102 N. C. 236; *Jones v. Britton*, 102 N. C. 166; *Fleming v. Graham*, 110 N. C. 374; and apart from these decisions which hold that the homestead right is not an estate in the land or a quality annexed to it, it is clearly not so, because:—

1. The words of the constitution can by no reasonable construction bear out that idea. Nothing in the land is given. The owner already has that in fee. The constitution only gives him a right to own and occupy it "exempt from sale." It merely puts up a shelter over him, and stays the sheriff's hand with a *cessat executio*.

2. If the homestead right was an "estate" in the land, it would be valued accordingly, and to get the one thousand dollars the quantity of land allotted would depend upon the age, health, expectancy of life, etc., of the claimant, otherwise the homestead estate of some would be more valuable than that of others. But it is the lot and buildings over which the protection is spread, which are to be worth, "not exceeding one thousand dollars." This shows that the "homestead" right is the exemption extended as a shelter above the lot, and not an estate in the lot itself.

3. If the homesteader had an estate in the land for his life, the crops or other income from it would be his. But as he has no estate in it, and merely a right to "own and occupy" it free from the presence of the sheriff, the income and crops are liable to his creditors: *Citizens' Nat. Bank v. Green*, 78 N. C. 247. The opinion in this case by Mr. Justice Bynum is one of very clear conception and one of the ablest discussions of the homestead ever made by the court. In it, it is said that the homestead creates no new right of property, but merely exempts one thousand dollars of it from sale; that it is "not a determinable fee, but a determinable right of exemption."

4. If the homestead right was an estate in the lot, whenever it was once conveyed away it would be gone forever and the homesteader would henceforth be without right to any homestead. The law surely does not contemplate that, like Esau, he should part with his birthright, or that an unmarried man by sale of his allotted homestead shall deprive his future wife and children of a right to shelter, however much realty he may retain or subsequently acquire."

The homestead right, however, is not an estate but an exemption, and the sale of the lot does not carry the exemption along with it. If it did the homesteader could forever thereafter claim no other exemption, or he could take another homestead lot and impart to it the exemption quality and con-

vey it with the exemption attached to it and so on without end. He might in this way, acquire and convey a dozen homesteads, and at the termination of the homestead right by his death, real estate to the amount of twelve thousand dollars would become subject to sale under executions docketed prior to his successive conveyances, but up to the time of his death twelve thousand dollars would be exempt from executions against him; this, of course, would be ridiculous and in clear violation of the constitutional provision that, "not exceeding one thousand dollars shall be exempt from sale under execution," and that such reasoning should not be entertained against the express language of the constitution it may be observed that, —

1. The homesteader is not compelled to sell; he may rent out, and thus still "own and occupy," and with liberty to rent for himself another home.

2. The homestead, or life right, in a one thousand dollar lot will not bring him the one thousand dollars the fee-simple is worth, and when he proceeds to take another one thousand dollar lot as a homestead, he is adding money due his creditors to the exemption allowed, and in several successive sales of a life right in one one thousand dollar lot and the purchase of the fee-simple of another one thousand dollar lot, he will put in largely more than the, "one thousand dollars exempt from execution," beyond which amount he is forbidden to go.

Besides, he can convey the homestead right (if it is true it can be conveyed) to his grantee in no better plight than he himself held it. If he puts improvements on the homestead, it is subject to revaluation: *Vanstory v. Thornton*, 110 N. C. 10. Will it not be subject to revaluation if his grantee puts improvements on it? He can convey no greater exemption right than he had. And it is surely not public policy that where a man has conveyed several successive homesteads each shall lie dead, deprived of improvements for fear of reallocation.

Again, while the homestead is in possession of the homesteader, the incoming crops are liable to his debts. He has only the right of use and occupancy: *Citizens' Nat. Bank v. Green*, 78 N. C. 247. As he can convey no greater exemption to his grantee than the law has given himself, it follows that the crops and income from each of the successive homesteads is liable to the grantor's debts, and the temporary holders can only have the right to use and occupy.

And still again, under the late act of the legislature the lots protected from execution by right of the homestead are subject to revaluation whenever they "exceed one thousand dollars." When there have been successive homesteads allotted the creditors can have them reallocated under the act and if the aggregate amount "exempt from execution" exceeds one thousand dollars, a reallocation would expose the excess to sale leaving only the one thousand dollars then "owned and occupied" by him sheltered from the sheriff. He cannot give to successive grantees an exemption of the crops, and from revaluation which he himself does not possess. "The decision in *Adrian v. Shaw*, 82 N. C. 474, ceased to have any logical force when the court held, as it has since repeatedly done, that the homestead right was not an estate in the land, but a mere exemption. If so it is personal to the debtor and he cannot convey it away. He can convey away the homestead land. If there are no judgments or other liens he can give a clear title; if there are such liens he can convey only his title, subject to the liens, since he waives, as he is empowered to do, his homestead right to protect that lot of land from sale, because ceasing by his deed, with his wife's consent to own it. He can acquire as many successive homesteads as he pleases and protect

them by the homestead right, but to each the homestead right ceases when he ceases respectively, to own them; he has but one homestead right. He can put that up over successive lots of one thousand dollars, but he cannot alienate it or give anyone else the benefit of it."

Judge Clark reviewed the conflicting decisions in North Carolina on the subject of homestead exemptions for the purpose of showing the present state of the law in that state, and also to show that at least in ten different points the view first taken has been subsequently overruled. He summarized the cases as follows: —

1. The court held the exemption applied to pre-existing debts: *Hill v. Kessler*, 63 N. C. 437, and numerous other cases. This has not been so since *Edwards v. Kearney*, 96 U. S. 595.

2. It was held that the homesteader might be estopped to claim it by his declarations: *Mayho v. Cotton*, 69 N. C. 289. This was expressly overruled in *Hughes v. Hodges*, 102 N. C. 236, which affirms the contrary to be the law since *Lambert v. Kinnery*, 74 N. C. 348.

3. It was held that the homestead was a "determinable fee": *Poe v. Hurdie*, 65 N. C. 447. This is overruled in *Citizens' Nat. Bank v. Green*, 78 N. C. 247.

4. It was held not impeachable for waste because a determinable fee: *Poe v. Hurdie*, 65 N. C. 447. In *Jones v. Britton*, 102 N. C. 166, it is now held that the creditor can, by injunction, restrain waste.

5. It was held that the amount could be increased, though not diminished: *Martin v. Hughes*, 67 N. C. 293. In view not only of the constitutional provision that it "shall not exceed one thousand dollars," but of the provision limiting the duration of the homestead exemption to the minority of the children, this was reversed in *Wharton v. Taylor*, 88 N. C. 230, and the act which had been passed prohibiting the lien of the docketed judgment on the lot sheltered by the homestead was repealed at the next session of the legislature: Acts 1885, c. 359.

6. It was held that the homestead was not absolutely void as to debts contracted prior to the constitution, but only if it appeared there was not property sufficient outside of the homestead: *Albright v. Albright*, 88 N. C. 238; *Morrison v. Watson*, 101 N. C. 332. This was reversed in *Long v. Walker*, 105 N. C. 90.

7. In *Adrian v. Shaw*, 82 N. C. 474, it was held that the homestead was not forfeited by the homesteader's removal from the state. It was held otherwise in *Finley v. Saunders*, 98 N. C. 462, and the other cases *supra*.

8. It was held that once allotted the homestead could not be reallocated: *Gulley v. Cole*, 96 N. C. 447. This was in part reversed by *Vanstory v. Thornton*, 110 N. C. 10, and is now entirely changed by the act of 1893.

9. In *Adrian v. Shaw*, 82 N. C. 474, it was held that the homestead was an estate in the land. In repeated decisions above cited, that has been reversed, and it is held a mere exemption right.

10. In the same case it was held that the conveyance of the homestead land carried with it the homestead exemption of the debtor. This was denied in *Fleming v. Graham*, 110 N. C. 374.

"Upon these decisions as held in the overruling and later opinions in each particular, we should hold: 1. That the homestead does not apply to debts existing prior to the constitution; 2. That the homesteader cannot be estopped to claim it; 3. That it is a determinable exemption, not a determinable fee; 4. That waste thereon can be restrained on application of a creditor; 5. That it cannot be increased beyond one thousand dollars, nor

can the judgment creditor be deprived of his lien on it by any legislation; 6. That it is void as to debts existing at the adoption of the constitution, whether there is enough other property or not to satisfy executions; 7. That it is forfeited when claimant ceases to be a resident of the state; 8. That when, by improvements placed upon it, or by enhancement of values, it exceeds the constitutional limit of one thousand dollars, it can be reallocated; 9. That the homestead is not an estate in the land, but a mere exemption from sale; and 10. The conveyance of the homestead land does not alienate or convey the homestead right therewith: *Fleming v. Graham*, 110 N. C. 374. The grantee gets the land subject to liens, and without benefit of the grantor's homestead right, which protected it only while owned by him.

"Upon reason, and the above authorities, the homestead right is a privilege of exempting one thousand dollars from sale. It is personal, and cannot be alienated, but it may be waived as to any particular lot by ceasing to be a resident of the state, or by ceasing to own and occupy the lot.

"It has been waived or lost as to this lot by the mortgage and sale under it, and the homesteader cannot give to his mortgagee a right to the use of the proceeds when he has himself lost the right to 'use and occupy' the lot."

Judgment Liens on Homesteads.*

Homesteads — Judgment Liens as Affecting — Lien not Divested by Subsequent Occupation. — Although it is a general rule that the lien of a docketed judgment will not attach to a homestead while it is occupied or held as such, yet in most of the states the lien of a judgment existing prior to the occupation by the debtor of the land as a homestead, or of his declaration of intention to hold it as such, is superior to the homestead right, and the land may be subjected to the satisfaction and discharge of such judgment. In other words, a judgment lien takes precedence of a subsequently acquired homestead right: *Gage v. Neblett*, 57 Tex. 374; *Elston v. Robinson*, 21 Iowa, 531; *Bills v. Mason*, 42 Iowa, 329; *Bowker v. Collins*, 4 Neb. 494; *Bunn v. Lindsay*, 95 Mo. 250; 6 Am. St. Rep. 48; *Smith v. Richards*, 2 Idaho, 464; *Kennerly v. Swartz*, 83 Va. 704; *Kelly v. Dill*, 23 Minn. 435; *Bartholomew v. Hook*, 23 Cal. 278; *Robinson v. Wilson*, 15 Kan. 595; 22 Am. Rep. 272; *Bullen v. Hiatt*, 12 Kan. 98. The reason of the rule is thus stated in *Bowker v. Collins*, 4 Neb. 494-496: "It is clearly shown that the lien of the judgment had attached to the lands in question at the time Collins entered thereon, for the purpose of claiming the same as a homestead. Does the right of homestead attach in such a case so as to defeat the lien of the judgment? We think not. The law evidently requires that the lands to be selected as a homestead shall be actually used for that purpose at the time the judgment is recovered. The homestead law being remedial in its character should receive the most liberal construction consistent with justice for the purpose of preserving a home to the unfortunate. But it must not be forgotten that the payment of just obligations is the foundation on which rests our industrial and commercial prosperity. And the design of the homestead law is not to enable those claiming its benefits to evade the payment of debts justly due, but to prevent the homestead being broken up and destroyed, and to leave under the control of the debtor the means by which he may, by economy, retrieve his fortune, and be enabled in time to meet his obligations. But lands not occupied for homestead purposes at the time judgment was recovered, it is reasonable to suppose were used as a means of obtaining credit, their occupation

* REFERENCE TO MONOGRAPHIC NOTE.

Judgment, whether lien on homestead: 87 Am. Dec. 278, 279.

at that time not being considered necessary for preserving a home for the family. A party cannot be permitted to defeat the payment of his just debts by afterwards removing thereon and asserting a claim of homestead. To sanction such doctrine under the pretext of liberality of construction of the homestead law opens the door to gross abuse and fraud, and offers a premium to dishonesty, while but few of those for whom the homestead law was designed would be benefited thereby." Again, in *Kennerly v. Swarts*, 83 Va. 705, it was said: "The judgment lien had become fastened on the land before the appellant acquired the right to the benefit of the homestead law at all. It was a vested right, and could not be suspended or impaired by the subsequent status of the appellant as a householder, and his consequent rights as such. It was a security within the meaning of the constitution, which provides that the claim of homestead shall not be good as against any mortgage, deed of trust, pledge, or other security on the property in which the claim is asserted. And therefore it is paramount to appellant's claim, although he has the privilege of holding the land free of the lien upon paying or discharging it." In Virginia, however, the peculiar rule exists that when the lien of a judgment attaches to land before a homestead is claimed therein, it cannot be enforced during the homestead's existence; but after the homestead is abandoned, such lien attaches and takes precedence of other liens. This rule has its foundation in the statute, and is admitted to be unlike that existing in most of the states of the Union: *Bloss v. Bear*, 87 Va. 177.

In some of the states, as in California, land is not exempt as a homestead until it is in fact the home of the debtor, and a declaration filed in advance of the actual occupancy of the property as a homestead is unavailing. In other states a more liberal, and perhaps more reasonable, construction is given to the statute; and land is protected when acquired for homestead purposes, although neither occupied, nor fit for occupancy as a homestead, provided the debtor is proceeding in good faith and with reasonable diligence to build a dwelling, and to take up his residence thereon. Therefore a judgment recovered after the purchase and before the occupancy as a home does not create any lien on the property: *Cameron v. Gebhard*, 85 Tex. 610, *post*, p. 832, and note. If a judgment lien exists against him, before he purchases the property, and his purchase is for homestead purposes, and he and his family reside on the property before the purchase, the acquisition of the title and of the homestead right are treated as coincident, and as affording no opportunity for the judgment lien to attach so as to acquire precedence over the homestead exemption: *Freiberg v. Walen*, 85 Tex. 264, *post*, p. 808.

When the lien of a judgment has attached to the land of a debtor it cannot be divested by subsequent legislation or constitutional provision exempting a homestead from forced sale. Homestead laws exempting property from seizure and sale are wholly inoperative and void as to judgment liens created prior to such laws: *Martin v. Kirkpatrick*, 30 La. Ann., part 2, p. 1214; *Lowdermilk v. Corpening*, 92 N. C. 333; *Smith v. Whittle*, 50 Ga. 626; *Hiley v. Bridges*, 60 Ga. 375; *Dopp v. Albee*, 17 Wis. 609; *Gunn v. Barry*, 15 Wall. 610; *Edwards v. Kearney*, 96 U. S. 595. As to judgment liens created before the adoption of a legislative act or constitutional provision exempting homesteads from forced sale, the reason of the rule that such act or provision does not supersede or divest such lien is, because if allowed to do so, it would impair the obligation of a contract by destroying the remedy in material respects. In *Gunn v. Barry*, 15 Wall. 610, the question arose

under a provision of a new constitution for the state of Georgia, which extended the homestead exemption so that it destroyed a judgment lien which a creditor had under previously existing laws, and the court, in delivering the opinion while speaking of such constitution, said: "It withdraws the land from the lien of the judgment, and thus destroys a vested right of property which the creditor had acquired in the pursuit of the remedy to which he was entitled by the law as it stood when the judgment was recovered. It is, in effect, taking one person's property and giving it to another without compensation. This is contrary to reason and justice, and to the fundamental principles of the social compact." And the court, in *Seamans v. Carter*, 15 Wis. 548, 82 Am. Dec. 696, while speaking of a statute of similar import, said: "Yet all there is in the act under consideration indicating that the legislature intended to affect the operation of judgments previously rendered is the mere use of general language which might include them. It provides that 'the owner of a homestead, under the laws of this state, may remove therefrom, or sell and convey the same; and such removal or sale and conveyance shall not render such homestead liable or subject to forced sale on execution, or other final process hereafter issued on any judgment or decree of any court of this state, or of the district court of the United States for the state of Wisconsin.' Now it is true that the language 'any judgment or decree' is unqualified, and might be extended to past judgments as well as future. But without something more pointed to indicate an intention that it should have that effect, it must be assumed that the legislature used it with the knowledge that it would be construed in accordance with the rule above stated, and held to relate only to judgments or decrees thereafter rendered."

Judgment Lien, whether Attaches to Existing Homestead. — It is undoubtedly settled beyond all question that when a statute exempts a homestead from forced sale, a judgment against the homestead debtor after he has acquired the homestead right will not create a lien upon the homestead which can be enforced while it retains its homestead character in the hands of the debtor; but as to any other effect of judgments upon existing homesteads there are two conflicting lines of decision. One holds that the lien of a judgment does not attach to the homestead in any event, and that it may be conveyed by the judgment debtor free of such lien, while the other line of cases hold that the lien of a judgment does attach to an existing homestead, but remains dormant, or in abeyance, while the land continues to be occupied as a homestead, and becomes active or potential as soon as the homestead right is lost or terminates by alienation, abandonment, or otherwise. As the right to a homestead exemption is generally, if not universally, created by statute, the question as to whether or not a judgment docketed against a debtor subsequently to his acquiring a homestead, attaches to and becomes a lien against it, must necessarily be a matter of construction merely. Those cases which hold that a judgment is not a lien upon the homestead property, proceed upon the theory that a judgment is not a lien upon property which is not vendible under execution; that the lien of a judgment like the homestead exemption, is purely the creature of the statute, and that the legislature, in one statute, having created and defined the lien of a judgment upon the realty of the debtor, and in another provided that a defined portion of the debtor's realty shall be exempt from sale for the satisfaction of judgments against him, the two statutes cannot stand together in their full extent, and the latter must be held partially to displace the former. The courts which support this view draw their principal reasons from the supposed gen-

eral policy of the legislature in creating the homestead exemption; but the courts which adopt an opposite view say that the homestead exemption is not an assignable estate, but a mere possessory right, personal to the debtor, and which does not run with the land": Thompson on Homesteads and Exemptions, sec. 391.

Homestead Not Subject to Judgment Lien. — The weight of authority, as well as the better reasoning, is in favor of the doctrine that a judgment does not attach as a lien upon land used and occupied as a homestead by the judgment debtor, and that a conveyance of such homestead by him, while it is thus used and occupied, invests the grantee with title thereto, free from the lien of any judgments against the grantor. 2 Freeman on Judgments, sec. 355, and Thompson on Homesteads and Exemptions, secs. 398, 399, approve the view that the homestead of a debtor is not subject to the lien of a judgment against him, and that he may sell and convey it, or encumber it, without furnishing any opportunity for such lien to attach. Among the many cases which maintain this rule may be cited *Green v. Marks*, 25 Ill. 221; *Fishback v. Lane*, 36 Ill. 437; *Bliss v. Clark*, 39 Ill. 590; 89 Am. Dec. 330; *McDonald v. Crandall*, 43 Ill. 231; 92 Am. Dec. 112; *Wiggins v. Chance*, 54 Ill. 175; *Conklin v. Foster*, 57 Ill. 104; *Haworth v. Travis*, 67 Ill. 301; *Seamans v. Carter*, 15 Wis. 548; 82 Am. Dec. 696; *Dopp v. Albee*, 17 Wis. 609; *Goodell v. Blumer*, 41 Wis. 436; *Carver v. Lassallette*, 57 Wis. 232; *Lamb v. Shays*, 14 Iowa, 567; *Beyer v. Thoeming*, 81 Iowa, 517; *Cummings v. Long*, 16 Iowa, 41; 85 Am. Dec. 502; *Cantrell v. Fowler*, 24 S. C. 424; *Ketchin v. McCarley*, 26 S. C. 1; 4 Am. St. Rep. 674; *Grimes v. Portman*, 99 Mo. 229; *Kaser v. Haas*, 27 Minn. 406; *Morris v. Ward*, 5 Kan. 239; *Monroe v. May*, 9 Kan. 466; *Dean v. McAdams*, 22 Kan. 544; *Elwell v. Hitchcock*, 41 Kan. 130; *Ackley v. Chamberlain*, 16 Cal. 181; 76 Am. Dec. 516; *McCracken v. Harris*, 54 Cal. 81; *Sullivan v. Hendrickson*, 54 Cal. 258; *Dumbould v. Rowley*, 113 Ind. 353; *Denny v. White*, 2 Cold. 283; 88 Am. Dec. 596; *Black v. Epperson*, 40 Tex. 163. By early decisions of the supreme courts of Wisconsin and Minnesota, statutes providing, in general terms, that judgments should be liens on all the defendant's real estate, were construed as extending such liens over homesteads, which by law were exempt from sale under execution. As a consequence the homestead owner could not alienate without, by thus removing the homestead character, leaving the property liable to be sold under any judgment against him existing at the date of conveyance: 2 Freeman on Judgments, sec. 355; *Hoyt v. Howe*, 3 Wis. 752; 62 Am. Dec. 705; *Folsom v. Carli*, 5 Minn. 335; 80 Am. Dec. 429; *Tillotson v. Millard*, 7 Minn. 513; 82 Am. Dec. 112. But the rule as thus announced has since been abrogated by statutes and decisions in both of these states, maintaining the rule that a judgment lien does not attach to the homestead, and that the homestead owner may sell and convey it free of such lien: Statutes of Minnesota, March 10, 1860; *Kaser v. Haas*, 27 Minn. 406; Wisconsin Law, 1858, c. 137; *Seamans v. Carter*, 15 Wis. 549; 82 Am. Dec. 696; *Dopp v. Albee*, 17 Wis. 609; *Goodell v. Blumer*, 41 Wis. 436; *Carver v. Lassallette*, 57 Wis. 232. The reasons for the majority rule as above given are excellently stated in *Morris v. Ward*, 5 Kan. 244, as follows: "These questions depend entirely upon the construction given to our homestead laws. There are at least two views which may be taken of these laws; one is, that the occupying of a piece of land as a homestead merely suspends the operation of any liens, alienations, or encumbrances concerning it during the time that it is so occupied as a homestead; for instance, that every deed, mortgage, or other conveyance of the homestead by the husband alone, and

every lien or encumbrance obtained through his act, or against him alone, is as effective and binding upon the homestead as it would be upon any other land, except that its operation is merely suspended while it is so occupied as a homestead, and that as soon as the land ceases to be occupied as a homestead, such deed, mortgage, conveyance, lien, or encumbrance springs into full grown, practical, and effective operation; or, in other words, that the husband alone by his own act may alienate his homestead as fully and completely as he could any other land, by making a deed, mortgage, or other conveyance of it, or by allowing a decree of court to go against him for it, or by allowing a judgment lien to attach thereto, except, however, that such alienation is subject only to the contingency of his continuing to occupy the land as a homestead. We do not adopt this construction of our homestead laws; we do not believe that the framers of the constitution intended to found the homestead of the family upon such a precarious foundation, or to protect it by such slight and fragile safeguards. The homestead was not intended for the sport and play of capricious husbands merely, nor can it be made liable for his weaknesses or misfortunes. It was not established for the benefit of the husband alone, but for the benefit of the family and society, to protect the family from destitution, and society from the danger of her citizens becoming paupers. The other view of the homestead laws, and the one which we adopt, is, that no encumbrance, or lien, or interest can ever attach to or affect the homestead, except the ones mentioned in the constitution. These do not include judgment liens, and if the judgment claimed to be a lien against the land is against the husband alone, then it is obtaining an interest in the homestead of the family through the agency, act, or omission of the husband alone. It is so far an alienation of the homestead by the act or omission of the husband alone, without the consent of the wife. Such a construction is in direct conflict with the spirit of the constitution, if not the letter. It is not for the interest of society that families should forever remain stationary, and their homesteads be perpetual prisons; on the contrary, it is for the interests of society, as well as families, that families should be free to go and reside wherever they can do the best. But if the law is as claimed by the defendant below, then whenever a judgment is rendered against the husband, the family must forever remain where they are at the time such judgment is rendered, or lose, not only their homestead, but also the means of acquiring another. The innocent family and society must suffer through the improvidence, perhaps the fraud, or the misfortunes of the husband.

It is claimed that the judgment lien remains simply dormant during the time that the land is occupied as a homestead, and that as soon as it is transferred and ceased to be occupied as a homestead, the lien attaches and becomes effective. Now suppose the husband, in whom the title is, dies, the title to the property is immediately, by law, transferred from him to his widow and children, and he ceases to occupy the property as a homestead, will the judgment lien then attach and take the homestead away from the widow and children? And suppose the whole family die, except those children born after the judgment has been rendered, can those children hold the property as a homestead? If they can, then where is the certainty of a judgment lien ever attaching to a homestead and becoming effective. In the case at bar, several days before the land was abandoned as a homestead, and therefore several days before the judgment lien could have any practical existence, the land was conveyed to Morris. When then did this lien attach and become effective? and the court answered this question by hold-

ing that the lien never attached and that the homestead might be sold and conveyed by the husband and wife jointly, and that the purchaser would take the title free of such lien: *Morris v. Ward*, 5 Kan. 248. Of course, the question as to whether or not the wife must join the husband in a conveyance of the homestead must necessarily depend upon the statute under which the conveyance is made. In many cases the joinder of the wife is not required as in Iowa where it is said: "There is no dispute that, when the judgment was rendered and when the debt upon which it was founded was contracted, the land was the homestead of the defendant and her husband. Under this state of facts the judgment was no lien upon the property, and it never became a lien. The defendant's husband could not defraud his creditors by conveying it to his wife, or to any other person, for the very good reason that his creditors had no right to subject it to the payment of any debts contracted after the homestead right attached": *Beyer v. Thoenig*, 81 Iowa, 517-519. In a recent case in South Carolina the court said upon this subject: "It seems to us clear that under the express provisions of the statute law, the judgment under which defendants claim, even if valid, could have had no lien upon any property of the judgment debtor which was exempt from levy and sale under the homestead laws; and if, as the evidence tended to show, the property here in question was so exempt, the judgment was no lien upon it, and there can be no levy or sale of it under execution. Now if the judgment was no lien upon this property while in the possession of the debtor because it was exempt under the homestead laws, and if, as has been held, a judgment debtor can sell or mortgage his homestead, then it follows that the judgment never could be a lien upon the property in dispute, for as soon as it was conveyed to the plaintiff it became his property, and as such of course not subject to the lien of a judgment against another person; and if, as we have seen there was no lien upon it at the time of the sale to the plaintiff, then, of course, the plaintiff took his title free of any lien. The fact that the homestead had not been ad-measured and set off, is a matter of no consequence. That it is intended merely to designate what is exempt, and does not affect the right of exemption which is guaranteed by the constitution and laws passed in pursuance thereof, any other view would render the right of the debtor to sell his homestead absolutely valueless, and have the effect of tying him down to one particular spot; for if his creditors can follow the property exempted while in his hands after it gets into the hands of a purchaser, it is not likely that he would ever be able to find a purchaser": *Cantrell v. Fowler*, 24 S. C. 424-428.

Lien Attaches upon Abandonment. — Some of the courts which hold the above view also maintain that if the abandonment or relinquishment of the homestead claim so far precedes the conveyance of the homestead that they cannot be regarded as simultaneous acts, then an opportunity arising for the attaching of liens, the purchaser will take the property subject to all judgments docketed against the grantor at the time of the conveyance: *Marriner v. Smith*, 27 Cal. 650; *Green v. Marks*, 25 Ill. 221; 2 Freeman on Judgments, sec. 355; *Alexander v. Vennum*, 61 Iowa, 160. And in such case when the homestead exemption shall from any cause cease to exist and the premises become liable to levy and sale before they are conveyed, the first levy made thereafter will bind the property, no matter whether the writ is issued upon a senior or a junior judgment: *Bliss v. Clark*, 39 Ill. 590; 89 Am. Dec. 330; *McDonald v. Crandall*, 43 Ill. 231; 92 Am. Dec. 112.

Lands Purchased for Homestead not Subject to Lien. — In several of the states the rule prevails that when land is purchased for the purpose of occupation as a homestead, the purchaser will be allowed a reasonable time in which to enter upon and occupy it as such; and that judgments existing against such purchaser at the time of the purchase, or at any time prior to its occupancy as a homestead, do not constitute liens upon it if the debtor pursues the purpose of occupying it as a homestead within a reasonable time: *Monroe v. May*, 9 Kan. 466; *Gilworth v. Cody*, 21 Kan. 702; *Emporia etc. Ass'n v. Watson*, 45 Kan. 132; *Reske v. Reske*, 51 Mich. 541; 47 Am. Dec. 594; *Deville v. Widoe*, 64 Mich. 593; 8 Am. St. Rep. 852; *Neumaier v. Vincent*, 41 Minn. 481; *Crawford v. Richeson*, 101 Ill. 351; *Hanlon v. Pollard*, 17 Neb. 368; *Scofield v. Hopkins*, 61 Wis. 370. In *Edwards v. Fry*, 9 Kan. 291 (*425), the court said: "We know that a purchase of a homestead and the removal on to it cannot be made momentarily contemporaneous. It takes time for the party in possession to move out, and then more time for the purchaser to move in. Repairs may have to be made, or buildings partially or wholly erected. Now, the law does not wait until all this has been done, and the purchaser actually settled in his new home before attaching to it the inviolability of a homestead. A purchase of a homestead with a view to occupancy, followed by occupancy within a reasonable time, may secure *ab initio* a homestead inviolability." In the late case of *Scofield v. Hopkins*, 61 Wis. 370, holding that land purchased with the intent on the part of the purchaser to make it his homestead is not subject to the lien of a judgment existing against him at the time of the purchase, or subsequently acquired, the court, in delivering the opinion, said: "The *bona fide* intention of acquiring the premises for a homestead, without defrauding anyone evidenced by overt acts in fitting them to become such, followed by actual occupation in a reasonable time, must be held to give to the premises answering the description prescribed in the statute the character of a homestead, and the homestead exemption thus secured covers not only the land, but also such materials as are used thereon, and relates back to the time of the purchase with such intent to make the premises a homestead. . . . The policy of the law is to secure to the debtor and his family a homestead which shall be beyond the reach of his creditors, however numerous. This policy of the statute would certainly be frustrated if none are entitled to the exemption except those who have been so fortunate as to secure a homestead prior to becoming judgment debtors. The spirit, if not the letter, of the law gives the right of acquisition, as well as protection after acquisition. There can be no exemption without ownership. If it is also true that there can be no exemption until there is a dwelling house upon the premises, actual occupancy by the debtor personally, then it would be almost impossible for a homeless debtor with judgments docketed against him to get the benefit of the law; for the very instant he acquired the title the judgment lien would attach. Under such a construction the only possible way of securing such benefit would be to select premises with a dwelling house already thereon, and then actually occupy with the family prior to acquisition. But such strict literalism would do violence to the obvious intent of the legislature and the whole current of authority in this state upon the subject. It was among the purposes of the statute to enable anyone without a home of his own to acquire one, even though judgments may be docketed against him when he embarks in the enterprise. The acquisition of a completed homestead is seldom instantaneous. Generally, it requires years of industry and economic living. The purpose necessarily precedes the inception of the

work, and that is followed by successive steps, until completion is attained. The land must be acquired, the location of the dwelling house designated, the cellar dug, the materials procured, the foundation laid, and the superstructure erected, and then all fitted for a dwelling house before actual occupancy with the family can take place. These successive steps in the acquisition of a completed homestead, made in good faith, come within the spirit of the statute, and are each entitled to the protection afforded by it": *Scofield v. Hopkins*, 61 Wis. 374. To the same effect is *Cameron v. Gebhard*, 85 Tex. 610, *post*, p. 832.

Upon the same principle, when the debtor sells his homestead, and invests the proceeds in another, or when he exchanges the old homestead for a new one, the latter in either case to the extent of the amount of the homestead exemption is exempt from existing judgment liens or debts against him at the time the exchange or purchase is made, provided he occupies it as his homestead within a reasonable time: *Thompson v. Rogers*, 51 Iowa, 333; *Watson v. Sazer*, 102 Ill. 585; *Freiberg v. Walzen*, 85 Tex. 264, *post*, p. 808; *Cowgell v. Warrington*, 66 Iowa, 666; *Eby v. Foster*, 61 Cal. 282; *Gardner v. Douglass*, 64 Tex. 76. In *Monroe v. May*, 9 Kan. 324 (*475), the court said: "A man may sell his homestead and give good title, no matter how many judgments may be standing against him. The proceeds of that sale he may reinvest in a homestead, and though he do not actually occupy it until after he has completed his purchase and secured his title, still, if he purchase it for a homestead, and enter into occupation within a reasonable time thereafter, no lien of existing judgments will attach." Again, in *Scofield v. Hopkins*, 61 Wis. 370-374, the court said: "Lands purchased with the proceeds of the sale of a homestead in another state, and which are owned and occupied by a resident of this state, are exempt, although the owner has not at the time of the docketing a judgment against him completed the dwelling house or moved therein with his family."

Cases Holding Homestead Subject to Judgment Lien. — There is quite a respectable number of cases which maintain that the lien of a docketed judgment attaches to the homestead of the judgment debtor, but that it remains dormant as long as the homestead is occupied as such, and becomes active and potential, and may be enforced as soon as the homestead right ceases by abandonment, alienation, or otherwise. Of course, under this construction of homestead laws the judgment debtor is barred from selling and conveying his homestead, no matter how advantageous an opportunity may present itself to sell the old and acquire a new homestead with the proceeds, or otherwise invest them for the greater benefit of the family, for under this rule a sale of the homestead by the debtor is a relinquishment of the protection afforded by the homestead act, and renders the judgment lien against him capable of immediate enforcement by execution: *Kellerman v. Aultman*, 30 Fed Rep. 888; *State Bank v. Carson*, 4 Neb. 498; *Eaton v. Ryan*, 5 Neb. 47; *Whitworth v. Lyons*, 39 Miss. 467; *Chambers v. Sallie*, 29 Ark. 407; *Jackson v. Allen*, 30 Ark. 110; *Moore v. Granger*, 30 Ark. 574; *Allen v. Cook*, 26 Barb. 374; *Smith v. Brackett*, 36 Barb. 571. These cases cite and rely upon the early cases of *Hoyt v. Howe*, 3 Wis. 752; 62 Am. Dec. 705; *Folsom v. Carl*, 5 Minn. 335; 80 Am. Dec. 429; and *Tillotson v. Millard*, 7 Minn. 513; 82 Am. Dec. 112; as authority for the doctrine expounded, but such cases in Wisconsin and Minnesota have been entirely abrogated by statutes and later decisions in both of these states, as we have already shown.

The opinion of the supreme court of Arkansas in the well-considered case of *Norris v. Kidd*, 28 Ark. 485, may serve to illustrate the reasons given for sus-

taining the above view of the homestead exemption. In that case it was said that, "all judgments are liens from the date of rendition upon lands owned by the judgment debtor within the jurisdiction of the court rendering the same. The fact that a judgment debtor may be entitled to a homestead exemption does not prevent the lien from attaching to land that may be selected as a homestead. The selection of the homestead takes it from the lien of the execution, and suspends the sale. The provision of our constitution is that the homestead of a married man or head of a family shall be exempt, not from a judgment lien, but sale on execution or other final process. . . . No injustice is done to the debtor by allowing the judgment lien to attach to the property claimed as a homestead, for the judgment lien in no manner interferes with his occupancy, nor does it deprive him of his home. . . . Our constitution is silent as to the right of the debtor to sell and convey his homestead; nor does it declare that the purchaser shall have any right beyond those he would acquire under an ordinary conveyance of real property, subject to existing liens and encumbrances. It must be evident to all that the framers of the constitution did not intend to confer the power on a debtor to sell his homestead, discharged of all lien. The constitution itself recognizes an estate in remainder, and a termination of the homestead estate. The fifth section of article 12 declares: 'The homestead of a family after the death of the owner thereof shall be exempt from the payment of his debts in all cases, during the minority of his children, and also so long as his widow shall remain unmarried, unless she be the owner of a homestead in her own right.' This clause of our constitution clearly discloses the intention that the homestead property of the debtor, after it had served the policy of the law, should be applied to the payment of debts, instead of passing to his heirs discharged of all liens under the statutes of descent and distribution." On the other hand, the better rule, and the rule supported by sounder reasoning as well as authority, undoubtedly is that, "homesteads, exempted from execution by statute are thereafter, so long as they retain their homestead character, clear from all judgment liens, and may, notwithstanding judgments docketed against their owners, be by them conveyed or encumbered without furnishing any opportunity for such liens to attach": 2 Freeman on Judgments, sec. 355. From the rule that the lien of a judgment attaches to the homestead during its occupancy as such, remaining dormant, however, while such occupancy continues, but springing into life when it ceases, flows the consequence that the debtor cannot, while judgments stand against him unsatisfied, mortgage or sell his homestead except subject to the liens of such judgment; that if he removes from such homestead with the view of acquiring another, the judgment lien immediately becomes active, and the premises may be sold. An insolvent debtor is thus reduced to a mere usufructuary interest in his homestead, the enjoyment of which depends upon uninterrupted occupancy. He can neither remove from it, nor encumber it, nor sell it, even for the purpose of acquiring another homestead more suitable to his condition and wants. If it is an urban homestead, it may become, in course of time, surrounded with unwholesome and offensive manufacturing establishments, and, at the same time, if he could sell it, it might command a ready price for such purposes. But he cannot escape from it with his family, without surrendering it to his creditors. Such a homestead may, indeed, be the asylum of an unfortunate debtor, but under the operation of such a rule it may also become his prison and his grave": Thompson on Homesteads and Exemptions, sec. 399.

Excess over Homestead Subject to Judgment Lien. — In all of the states granting a homestead exemption, quantitative and monetary limits as to the amount or quantity of land which may be held as a homestead are fixed by statute, and beyond this limit protection from forced sale does not extend; and it would seem, upon principle, that a judgment creditor of the homestead debtor may, by proper proceedings, reach so much of the property claimed and occupied as a homestead as is in excess of the quantity or value which the claimant is entitled to retain. In other words, that the excess above the statutory homestead valuation is subject to the lien of a judgment against the homestead debtor: 2 Freeman on Judgments, sec. 355. This doctrine has been adopted by the supreme courts of several of the states, notably Illinois; and wherever such rule is maintained, it is held that when the premises occupied by a debtor entitled to a homestead estate therein exceed in value the statutory homestead exemption limit, the lien of a judgment against him will attach to such excess in value, and it is subject to levy and sale under execution to satisfy such judgment: *Haworth v. Travis*, 67 Ill. 301; *Moriarty v. Galt*, 112 Ill. 373; *Young v. Morgan*, 89 Ill. 199; *Fishback v. Lane*, 36 Ill. 437; *McDonald v. Orandall*, 43 Ill. 231; 92 Am. Dec. 112; *Watson v. Doyle*, 130 Ill. 415; *Eldridge v. Pierce*, 90 Ill. 474; *Hardy v. Subbacher*, 62 Ala. 44; *Louden v. Yager*, 91 Ky. 57; *Tingley v. Gregory*, 30 Neb. 196; *Leak v. Gay*, 107 N. C. 468. In *Beckner v. Rule*, 91 Mo. 62-64, it was said: "Under the ruling of the circuit court, a homestead once assigned might grow to be three or four times the amount fixed by law, and yet the whole be out of the reach of creditors. The law does not contemplate such results. The debtor may have a homestead, but he must take and hold it subject to the fluctuations in value. If, in course of time, it should increase in value, so as to be worth more than the statutory limit, it may be assigned again, and the excess applied to the payment of his debt." When the property in which the homestead estate is claimed and exists exceeds in value the statutory limit, the excess is unaffected by the estate, and is liable to the same lien of judgments as other property of the homestead claimant: *Watson v. Doyle*, 130 Ill. 415. In *Eldridge v. Pierce*, 90 Ill. 478, it was said: "Where the property in which this estate exists exceeds in value one thousand dollars, the excess is plainly unaffected by the estate; that is to say, the excess is liable to the same lien of judgment, etc., and to be aliened in the same manner that other real property of the householder is." And to the same effect is the case of *Moriarty v. Galt*, 112 Ill. 373, where it was decided that when the land of the debtor occupied by him as a homestead exceeds the statutory limit in value, the lien of a judgment against such debtor attaches to such excess, and a sale by the debtor of his interest in the property cannot divest such lien, and defeat the rights of the judgment creditor, but such lien may be enforced at any time within seven years from the date of the judgment. *Fishback v. Lane*, 36 Ill. 437, is to the same effect. Improvements placed upon property occupied as a homestead, and thus increasing its value, or the rise in value thereof after the attaching of a judgment lien, will not prevent an allotment so as to reach the excess in value of the homestead above the statutory limit: *Haworth v. Travis*, 67 Ill. 301. Judgment liens against the excess in value of the homestead over the amount limited by statute will be paid in the order of their priority: *Tingley v. Gregory*, 30 Neb. 196; and no matter when the debts of judgment creditors may have been created, the debtor has a right to demand that junior mortgages shall be satisfied out of the proceeds arising from the sale of the excess above the homestead, in preference to such judgment debts: *Leak v. Gay*, 107 N. C. 468.

In California, a rule exactly contrary to that maintained in a majority of the states is firmly established. This rule is stated in *Sanders v. Russell*, 86 Cal. 119, 21 Am. St. Rep. 26, that though a homestead is in value largely in excess of the amount allowed by law, the docketing of a judgment against the homestead owner, and the levy of an execution under such judgment upon the homestead, does not create any lien. The operation of the levy of such execution simply serves as a foundation for statutory proceedings for the ascertainment of the value of the property covered by the declaration of homestead, and the procurement of an order of court for the partition and sale thereof, and the application of the excess to the satisfaction of the judgment. The same doctrine is announced in *Barrett v. Sims*, 59 Cal. 615, 618, and in *Lubbock v. McMann*, 82 Cal. 226, 16 Am. St. Rep. 108.

WELLS v. BATTS.

[112 NORTH CAROLINA, 283.]

HUSBAND AND WIFE — MORTGAGE BY HUSBAND OF CROPS ON WIFE'S LAND — SEPARATE ESTATE. — When a husband, being permitted by the wife to manage and control her land for the purpose of supporting herself and family, makes a mortgage of the crops thereon for supplies, without the joinder, authority, or knowledge of the wife, and with notice to the mortgagee of her ownership, he cannot enforce the mortgage as against the wife.

HUSBAND AND WIFE — HUSBAND'S MORTGAGE OF WIFE'S SEPARATE PROPERTY — AGENCY. — Although the wife has permitted her husband to manage and control her land for several years for the purpose of supporting herself and family, and to apply the crops growing thereon to the payment of supplies, he is not thereby authorized, as her agent, to mortgage such crop, without her knowledge or consent, to one who has notice of her ownership.

HUSBAND AND WIFE — RIGHT OF HUSBAND TO MORTGAGE WIFE'S INCOME. The exclusive receipt by the husband of the income of the wife, even during the entire period of the coverture, does not confer any rights upon him in or to her property, nor take away his liability to account for such income for at least one year preceding a demand. Hence he has no implied power to anticipate such income by mortgaging it to one having notice of her ownership.

HUSBAND AND WIFE — SEPARATE PROPERTY OF WIFE — EVIDENCE OF HUSBAND'S RIGHTS IN. — Evidence of a surrender by the wife to her husband of her rights in and to her separate property during the joint occupancy, must be positive and unequivocal in order to confer upon him any proprietary interest in the use of the land.

HUSBAND AND WIFE — MORTGAGE OF CROP — INTERMIXTURE — WHO MUST BEAR LOSS. — When a husband, prior to his death, has mortgaged crops growing on his own and his wife's land, and some of such crops are intermingled and mixed after his death that they cannot be distinguished or divided, the loss, as between the wife and the mortgagee, must fall upon the wife as the party entitled to the possession and as the party through whose fault or neglect the wrongful mixture has occurred, although she would otherwise be entitled to the whole of the crop grown upon her land.

G. V. Strong, F. A. Woodard, and Battle and Mordecai, for the appellant.

Woodard and Yarborough, for the appellees.

SHEPHERD, C. J. 1. It is found by the referee that the *feme* defendant, Mrs. Thorne, "owned in her own right all of the lands upon which the crops of 1889 were made, except five-sevenths of the one hundred and twenty-eight acre tract, which belonged to her husband, W. M. Thorne, deceased." The plaintiff claims the whole of these crops by virtue of a mortgage executed by the husband alone. The mortgage recites the ownership of the wife; and indeed it is not pretended that the plaintiff did not have actual notice of her interest in the said lands. Mrs. Thorne did not know of the execution of the mortgage, and there is nothing whatever to show that she ever authorized her husband to dispose of the products of her lands in any such manner. Neither is there anything to indicate that she made any representations or did any act by which the plaintiff could have been misled. The plaintiff, however, relies upon the fact that from the time of her marriage up to the death of her husband, in September, 1889, the latter had "the complete control and management of his and defendant's lands and the crops made on the same"; that he expended the proceeds of the crops made from year to year in the support of the family and the purchase of supplies to enable him to conduct and carry on his farming operations, with the knowledge of the said wife." It also appears that the *feme* defendant knew that her husband obtained supplies of the plaintiff from year to year, but had no knowledge of the execution of any mortgages on the crops.

Upon the death of the husband, in 1889, and before all of the crops of that year had been gathered, the plaintiff seized the same under legal proceedings, claiming them under the said mortgage. It appeared that the corn was raised wholly on the lands of the wife, and his honor sustained the referee in his ruling that she was not estopped from claiming the same, or at least so much thereof as amounted to a reasonable rent for the occupation of her said lands.

If the relation of landlord and tenant existed between the husband and wife, there can be no question as to the correctness of the ruling, as it is well settled that the lien of the landlord prevails over that of a mortgage executed by the tenant for the purpose of obtaining supplies. If the husband

was acting as the agent of the wife, the plaintiff would be equally unfortunate, as we are unable to find anything in the record that authorized him to execute a mortgage upon the future income of her property. She did not expressly authorize him to exercise such a power, as she neither knew of nor assented to the execution of this particular mortgage, nor can the authority be implied, as she had no knowledge of the execution by him of similar mortgages during previous years. It is true that she permitted her husband to control and manage her lands for the purpose of supporting herself and the family, and that she had allowed him for several years to apply the crops after they were made to the payment of supplies obtained of the plaintiff. This, however, was not done, so far as she was concerned, by virtue of any lien or mortgage in favor of the plaintiff, and is entirely consistent with the not unusual acquiescence of the wife where she and her husband are in the joint occupation of her lands, the husband receiving, without objection, the income arising from the same. Indeed, the law, recognizing the peculiarity of such an occupancy, has taken care that in such cases the rights of neither party shall be prejudiced by the inequitable conduct of the other. While it recognizes to the fullest extent the right of the wife to the exclusive control of her lands and its products (*Manning v. Manning*, 79 N. C. 300), it at the same time provides that where her husband has, during the coverture, received its income without objection, he shall not be liable to account "for such receipt for any greater sum than the year next preceding the date of a summons issued against him in an action for such income": Code, sec. 1837.

It appears, however, from the above statute, that the exclusive receipt by the husband of the income of the wife, even during the entire period of the coverture, does not confer upon him any rights in her property, nor take away his liability to account for its income for at least twelve months preceding a demand. If such an acquiescence in the control of her property and the reception of its income does not, under the statute, exempt the husband from liability to account as above stated, we are unable to see how it can be regarded as conclusive evidence of an implied power to anticipate the income of her property by mortgaging it to one having notice of her rights and thus depriving her of the same for the year preceding the death of her husband. It is very evident from the terms of the statute that the policy of the law re-

quires more than mere acquiescence to so extend the authority of the husband as agent. This view is in harmony with various authors who hold that in such cases a stricter degree of proof is required. Mr. Bishop says: "Under various circumstances an unmarried woman, by permitting another person to possess and use her property, would be bound by any disposition he might make of it, on the ground of presumed agency, where, should a husband do the same thing, the agency ought not to be inferred. And the reason is, that the relationship of husband and wife implies a certain occupancy of her property by him, not falling within what would be the ordinary course of things if the relationship did not exist": 2 Bishop on Married Women, ed. 1875, 396.

It is clear that in the present case there was nothing more than acquiescence on the part of the wife. The plaintiff knew of her ownership, and it was his own folly to have taken a mortgage upon the crops from the husband alone. So far from making any representation by which the plaintiff was misled, it appears that she knew nothing whatever of the transaction, and it is clear beyond all question that she is not estopped by reason of fraud. "To estop a married woman from alleging a claim to land (and the rule is the same as applicable to this case) there must be some positive act of fraud, or something done upon which a person dealing with her or in a manner affecting her rights might reasonably rely, and upon which he did rely, and was thereby injured": *Towles v. Fisher*, 77 N. C. 437; *Weathersbee v. Farrar*, 97 N. C. 106. There being no estoppel by fraud and nothing more than simple acquiescence in the acts of the husband, as above stated, we cannot hold that this warranted a finding that the husband was authorized to execute the mortgage in question. Indeed, he does not pretend to have executed it as agent of his wife, nor is there anything in the instrument to show that he undertook to contract in her behalf. This latter view alone would defeat the claim under the mortgage if the plaintiff relied entirely upon the principle of agency: *Loftin v. Crossland*, 94 N. C. 76.

The plaintiff's counsel, seeing the force of the foregoing objections, contend that the husband was neither the tenant nor the agent of the wife, but the owner of the land and its products at least for the year 1889. There is nothing but the circumstances to which we have adverted to show that the wife gave him the land for that or any other year, and if, as

we have seen, her simple acquiescence was not sufficient to exempt the husband from liability to account, we cannot understand how it could confer upon him a future ownership of the land or its income. It is true that the wife could upon a fair consideration have given the land by parol to the husband for a period less than three years: Code, sec. 1835; but in view of the reasons we have given, we are quite sure that no such agreement existed. There is an intimation in *George v. High*, 85 N. C. 99, that an express agreement is necessary to bar the wife's right to an account, and this would seem to apply also to the present case. Moreover, it is to be observed that the finding of the referee does not go to the extent claimed by the plaintiff, as the words "control and management" in themselves imply an agency rather than a proprietary interest in the use of the land. All of the authorities sustain the principle that the evidence of a surrender of the rights of the wife to the husband during the joint occupancy must be positive and unequivocal, and this "is for the reason that (in the general experience of the past at least if not in the philosophy of the present) the wife is under the control of and subordinate to the husband; and neither good law nor sound reason will require the wife to destroy the peace of her family and endanger the marriage relation by open repudiation or hostile conduct towards her husband, in order to save her property from liability for his unauthorized contracts": 2 Bishop on Married Women, 396.

To hold that under the present circumstances the wife has stripped herself of the income of her estate or authorized a mortgage of its future products, would produce much confusion respecting the enjoyment of her separate estate in connection with her husband. It is better that the law should require her positive and unequivocal assent than to destroy the domestic tranquility by forcing her, at the peril of forfeiting her rights, to exercise a constant and irritating surveillance over the conduct of her husband in the management and cultivation of her lands for their joint support. No inconvenience can result from such a ruling, as it is quite easy for a party making advances to require that she be joined as a party to the mortgage.

Our conclusion therefore is that the wife is the legal owner of the crops as incident to her ownership of the lands upon which they were raised and it must therefore follow that she is entitled to the possession of the same.

2. As to the corn there seems to be no difficulty, as it was identified as having been raised wholly upon the lands of Mrs. Thorne. As to the other crops it is found that they are so "intermingled and mixed" with those raised upon the lands of the husband "that it cannot be determined how much was raised upon the lands of said Thorne, deceased, and the *feme* defendant respectively."

The confusion having been effected without the consent of either party, it is clear that if the crops can be distinguished, the rights of neither will be affected; nor will this result follow although the crops cannot be distinguished, if, being of the same nature and value, a division can be made of their proportionate value: *Robinson v. Holt*, 39 N. H. 557; 75 Am. Dec. 233, and the numerous authorities cited.

The referee finds, in effect, that he can neither distinguish the crops nor ascertain their proportionate value. In such a case the law is, "that the party who occasions or through whose fault or neglect occurs the wrongful mixture must bear the whole loss": *Robinson v. Holt*, 39 N. H. 557; 75 Am. Dec. 233. His honor very properly ruled that under these circumstances the loss must fall upon the *feme* defendant, as we must infer from the finding of the referee that the confusion was caused by "her conduct in permitting W. M. Thorne, deceased, to cultivate and intermix said crops, and her son, W. W. Batts, administrator of said deceased, to intermix them in the same manner after his death." It is true that this was done by her "tacit" consent only, but it was the result at least of her neglect to see that the crops were not intermixed. She had the control of her lands and the crops thereon, and it was her duty to have kept the crops distinct from the husband's if she intended to insist upon her legal right to the same. It may be urged that it was equally the plaintiff's duty to see that the husband's crops were properly gathered and stored, but to this it may be answered that he had a right to assume that this would be done by the *feme* defendant and her son, the administrator. She was in possession of her own lands and presumably in possession as tenant in common of those upon which the husband's crops were raised. She and her son seem to have taken control of the crops after the death of her husband, and it is found that she permitted either her husband or son, or both, to mix the same. We must infer that by permitting she at least knew

of the intermixing and did not object, and this would be "neglect" within the principle of the authority cited.

On the other hand the plaintiff had but a lien on the crops of the husband and no right to the possession of the land, and in the absence of any knowledge that the crops would be confused with those of the *feme* defendant, he had nothing to incite him to extraordinary diligence. He certainly knew nothing of the intermixing and had no opportunity, as did the *feme* defendant, to object to the same. Taking all of the circumstances into consideration, we think his right is superior to that of the *feme* defendant and that the ruling below must be affirmed. Indeed, upon looking over the whole record, we are inclined to the belief that, after all, this result contributes very greatly to an equitable settlement of the whole controversy.

Affirmed.

HUSBAND AND WIFE — HOW FAR WIFE IS BOUND BY ACTS OF HUSBAND AS HER AGENT. — A married woman who is possessed of a separate estate, and is engaged in conducting a separate business, may employ her husband to carry on such business: *Third Nat. Bank v. Guenther*, 123 N. Y. 568; 20 Am. St. Rep. 780; and if, while acting as such agent, he purchases articles for the benefit of her separate estate, she is liable for the price thereof: *Brown v. Thomson*, 31 S. C. 436; 17 Am. St. Rep. 40. A wife cannot be bound by the unauthorized statement of her husband regarding her separate property: *Wright v. Towle*, 67 Mich. 255; nor will her acquiescence in a verbal sale by her husband of personal property belonging to her separate estate for the payment of his debts, nor her declaration that "it was all right," pass title as against her: *Stout v. Kinsey*, 90 Ala. 546; but where he is acting in the management of her property, and his action naturally tends to accomplish her known wishes in regard to it, little evidence is needed to warrant an inference that the action was authorized by her: *Simes v. Rockwell*, 156 Mass. 372. Whether he has been constituted her agent is a question of fact for the jury: *Brown v. Thomson*, 31 S. C. 436; 17 Am. St. Rep. 40. She may also be estopped by her own conduct to deny the liability of her separate estate for the debts of her husband, as where she permits him to do business in his own name with her own property, and incur debts on the faith that he was the owner thereof: *Barly v. Wilson*, 31 Neb. 458, following *Roy v. McPherson*, 11 Neb. 197; but such liability will not arise merely because she allows him to have a general use of and control over the estate consistent with their common interests: *Dean v. Bailey*, 50 Ill. 481; 99 Am. D. 533.

PERSONAL PROPERTY, CONFUSION OF: See generally note to *Pulcifer v. Page*, 54 Am. Dec. 589-597. The doctrine as to confusion of goods is: If the goods can be distinguished and separated, each may claim his own. If the goods are of the same nature and value, as corn, tea, etc., then each may claim his aliquot part; but if the mixture is not distinguishable, nor an aliquot division possible, then the party through whose neglect or default the wrongful mixture has occurred must bear the whole loss: *Robinson v.*

Holt, 39 N. H. 557; 75 Am. Dec. 233; *Hesseltine v. Stockwell*, 30 Me. 237; 50 Am. Dec. 627; *Stins v. Gluzener*, 14 Ala. 695; 48 Am. Dec. 120; *Inglebright v. Hammond*, 19 Ohio, 337; 53 Am. Dec. 430; *Gates v. Rifle Boom Co.*, 70 Mich. 309 (citing numerous authorities); *Olaftin v. Continental Jersey Works*, 85 Ga. 27; *Stone v. Quaal*, 36 Minn. 46; *Lang v. Dougherty*, 74 Tex. 226.

WILLIAMS v. JOHNSON.

[112 NORTH CAROLINA, 424.]

JUDGMENTS — CONCLUSIVENESS OF — ATTORNEY'S AUTHORITY. — When a petition for the sale of land, filed by an attorney on behalf of a widow and heirs, results in a judgment and sale thereunder, such judgment cannot be attacked, either directly or collaterally, by such heirs on the ground that the attorney had no authority to represent them. Such authority is conclusively presumed as to purchasers under the judgment who are ignorant of the attorney's want of authority.

JUDGMENTS — ATTORNEY'S AUTHORITY — PRESUMPTION. — A party about to purchase land under a judgment of a court having jurisdiction of the parties and the subject-matter is not bound to inquire into the authority of the attorneys who profess to represent such parties. Such authority is conclusively presumed.

EXECUTION SALES — DUTY OF PURCHASER. — A stranger to an action having no notice of any fraud or irregularity in the judgment under which he purchases need only inquire whether or not the court from which the execution issued had jurisdiction of the parties and of the subject-matter.

EXECUTION SALES — INADEQUACY OF PRICE AS GROUND FOR AVOIDING. — Inadequacy of price at an execution sale of land cannot affect the purchaser's title when he had no notice of any fraud or irregularity in the judgment under which he purchased and to which he is a stranger.

ACTION to set aside a judgment as fraudulent and to recover land sold under execution issued thereon. Judgment for the plaintiffs, and defendants appealed.

Batchelor and Devereux, and Armistead Jones, for the appellants.

George H. Snow, and Battle and Mordecai, for the appellees.

BURWELL, J. The lot of land in controversy in this action was owned at the time of his death, in 1851, by S. W. Williams, to whose widow, Polly Williams, it was assigned as dower. She died in 1886. His heirs at law were his six children, three of whom, to wit, W. Gaston Williams, Frank N. Williams, and Mary J. Smith, are plaintiffs, each claiming one-sixth part of said lot. The children of a daughter who died in 1878, and who was the wife of the plaintiff, E.

Jefferson Smith, are also plaintiffs, and claim one-sixth part of said lot as heirs of their mother. The other two children of S. W. Williams are not parties to this action.

It is alleged in the complaint that the defendants hold said lot under the widow, who died as above stated in 1886, and also under a deed made to the defendant Emily Johnson by T. F. Lee, sheriff of Wake County, dated April 26, 1873, he having sold the lot according to law on April 7, 1873, under an execution issued to him from the superior court of said county against the widow and children of S. W. Williams and also against I. J. Flowers, the husband of one of the daughters, and Jefferson Smith (one of the plaintiffs in this action), the husband of another daughter, for a bill of costs amounting to sixteen dollars and ten cents, the consideration expressed in said deed being eighteen dollars and five cents, bid by said defendant.

It is further alleged that the judgment for costs, upon which the said execution was issued, was irregular and fraudulent. And the plaintiffs demand judgment: 1. That the said judgment "be set aside as to these plaintiffs as being irregular and fraudulent"; 2. That the deed from T. F. Lee, sheriff, to Emily Johnson be delivered up for cancellation; and 3. That they are the owners of the land described in the complaint.

The primary object of this action is, therefore, to have a judgment rendered against the plaintiffs in the superior court of Wake County in 1872 declared void because of fraud, and thus destroy the force and validity of defendant's title under the deed made to her by the sheriff.

In the complaint first filed the plaintiffs only alleged their ownership of the lot in controversy, and that defendants unlawfully withheld the same from them, and demanded possession thereof. The amended complaint changes the object of their suit to that above stated, their learned counsel thus conceding, as it seems, that they cannot oust the defendant from the land until they have first had vacated and set aside the judgment, execution, and sheriff's deed thereunder, which constitute, as we think, the defendant's only muniment of title.

Upon the evidence adduced, and under the instructions of his honor, the jury have found that this judgment against the plaintiffs was procured by the fraud of the widow, the life tenant, and that the defendant Emily Johnson had notice of this fraud when she bought the land at the execution

sale made under said judgment; and because of this fraud and defendant's notice thereof, it was adjudged that the judgment, execution, and deed were void.

Upon the trial the counsel for the defendants contended that there was no evidence that their clients had any notice of the alleged fraudulent conduct of the widow, and that the evidence offered to establish that fraud was incompetent against them.

His honor decided that the evidence offered to establish the alleged fraud was competent against the defendants, and that there was evidence from which the jury might infer that defendants had notice of that fraud, and he so instructed the jury. In these respects we think he erred.

There seems to be little conflict in the testimony offered by the parties on the trial, and the conflict is about matter that appears to us immaterial.

It is alleged in the complaint and admitted in the answer that at fall term, 1863, of the court of equity of Wake County, an *ex parte* petition was filed by the late Sion H. Rogers, a practising attorney of that court, in behalf of the widow and heirs of S. W. Williams (the husbands of the *femes covert* being also parties), asking that a sale of the lot here in controversy be made, in order that the fund arising from such sale might be reinvested in a tract of land to be held by the widow for life, and then to each of the other petitioners as tenants in common, according to their rights in the lot sold. This was accompanied by an affidavit of two persons that it was for the interest of all the parties that the sale should be made and the fund invested as proposed. No orders or decrees seem to have been made while the cause was pending in the court of equity, but it was transferred to the superior court in 1868, and was continued from term to term till fall term, 1872, when a judgment was entered against the petitioners for costs, amounting to sixteen dollars and ten cents, and execution was issued and a sale was made to defendant Emily Johnson as heretofore stated. She was in possession of the premises at the time of the sale, and had been in possession since November, 1863, when she had purchased the lot at the price of two thousand five hundred dollars from one Overby, who had bought it from W. H. High on the third day of November, 1863. High had purchased it on the second day of August, 1863, from one Harris Flowers, and the latter held it under the following contract:—

"Whereas the undersigned have this day sold to Harris Flowers and his heirs a lot of ground near the city of Raleigh for the sum of fourteen hundred dollars; and whereas, some of the parties interested are under age: Now, know ye, that the undersigned Polly Williams, David Williams, and S. N. Williams bind themselves, their heirs, executors, and administrators, to make to the said Harris Flowers and his heirs a good and indefeasible title to the same, or cause to be made such title by procuring a decree of the court of equity securing said title, or by procuring the execution of a proper deed from the parties interested, whether of age now, or of nonage; and in default thereof we bind ourselves, our heirs, executors, and administrators, in the full and just sum of fourteen hundred dollars, and all interest from this date, and all such costs as he may be put to by reason of a failure to have said title made as above obligated. In witness whereof," etc.

This contract was executed in July, 1863, and was registered soon after its execution, and the recitals in her deed were such as to give notice to her that those under whom she held claimed under this contract.

It was also proved that for two years prior to her purchase of the lot in 1863 the defendant Emily Johnson had occupied it as tenant of the widow, Polly Williams, to whom she was connected by marriage, her brother having married a sister of Polly Williams.

Such being the relation of the parties to one another and to the matter in controversy, the plaintiffs insist that they shall be permitted to prove that the petition in the court of equity of Wake County for the sale of the lot and the reinvestment of the fund was filed by Sion H. Rogers at the instance and request of the widow, and that neither he nor she had any authority from the plaintiffs to file that petition, and that they had never ratified their action — that they were indeed ignorant of the fact that such a petition had been filed, or that any judgment for costs had been entered against them, or that any sale had been made thereunder till shortly before the bringing of this action, and that this petition was filed by the widow without the knowledge or consent of the heirs, and this judgment for costs, that had not been earned was entered, and this sale under execution was made to cheat and defraud the heirs of S. W. Williams of their reversion in this lot.

The charge of fraud brought at this late day by the plaintiffs against their mother is founded upon the idea not that

she did directly any act to deprive them of their title, but that, without any authority from them, she employed a most respectable solicitor, able and faithful, to ask a court of equity to sell the lot and itself invest the proceeds in other real estate.

We deem it unnecessary to discuss the evidence that tends to prove or disprove this charge of fraud, for we find no testimony that in our opinion in any way goes to show that the defendant Emily Johnson knew that the solicitor who filed the petition was acting without authority from the clients he professed to represent, or that the widow was contriving to cheat and defraud her own children. The facts that she was distantly connected with the widow by marriage, and that she and her husband had occupied the lot from 1861 to 1868 as her tenants go for nothing. The recitals in her deed pointing, as plaintiffs contend, to the contract made by the widow and set out above in full, seem to us rather an assurance that the proceeding to perfect the title through the intervention of a court of equity was properly instituted, and that all the parties to the petition had come into that court and submitted themselves to its jurisdiction, than the contrary.

As the defendant had no notice that the solicitor had no authority to represent the petitioners, it is conclusively presumed as to her that he did have such authority, and no evidence tending to disprove the existence of such authority should have been admitted to overthrow rights which she had acquired while ignorant of such want of authority.

Attorneys and solicitors are officers of the courts. They are expressly empowered to represent litigants, plaintiffs, and defendants, and parties who are about to acquire rights under the judgments of courts are not at all bound to inquire into the authority of the attorneys who profess to represent the plaintiffs or petitioners. It is said of such persons that they "come into court by their attorney"; it is not permitted to them to say that they did not so come when the rights of innocent third persons have intervened.

So far then, as concerns the defendants, the court of equity of Wake County and its successor, the superior court, had jurisdiction of the persons named as petitioners in the petition for the sale of the lot, and, if it is conceded, as plaintiffs contend, that there was no decree for the sale of the lot, still a judgment against the petitioners for costs, not excepted to or appealed from, was binding upon them; for they were

to all intents and purposes present in court and subject to its orders and judgments made in that proceeding. Upon this judgment for costs, which the plaintiffs now say they did not owe, but to which they then, though in theory present in court, offered no objection, an execution was issued and a sale was made. To that sale the defendant went in the person of her agent. She and the heirs were antagonists. Their interests required that they should pay off this judgment for costs, and thus save their reversionary interests from sale. Her interests demanded that she should perfect her defective title at as little cost to herself as possible. She had a right to presume that the sheriff had notified each one of the heirs of the sale, for the law (Acts 1868, 1869, c. 237, sec. 11) required him to do so, and he was liable for damages if, through his failure to so notify them, any loss came to them. Being a stranger to the judgment, all that she was required to ascertain was that an officer was making the sale and that he was empowered to do so by a court of competent jurisdiction: *Burton v. Spiers*, 92 N. C. 503. She was not called upon to bid against herself, and under the circumstances that surrounded her, she acquired by her bid and the deed made pursuant thereto a good title against the heirs of S. W. Williams, named in the execution, and their heirs; for, having no notice of any irregularity or fraud in the judgment under which she bought, as we have seen, she had only to inquire if the court from which the execution issued had jurisdiction of the parties and the subject-matter: *England v. Garner*, 90 N. C. 197, and the cases there cited.

And as she was, as we have seen, in no way connected with the alleged fraud, the smallness of the price at which the lot was bid off by her cannot affect her title. These plaintiffs cannot be heard to complain that their property, sold under an execution of which they had notice (and as to these defendants such notice is conclusively presumed), brought too little. In *Durant v. Crowell*, 97 N. C. 367, the inadequacy of the price bid by the defendant, and at which the sale was confirmed to her, was held to be a fact from which she should have inferred that the title of the party whose title she acquired was not free from equities of the plaintiffs, but no such contention was made as that she did not acquire for the small sum bid the title of the party whose interest in the land was offered for sale. Creditors of the execution debtor may use inadequacy of price bid as evidence of fraud and collusion between

the purchaser and the debtor as in *Osborne v. Wilkes*, 108 N. C. 671, but no case can be found, we think, that sustains the plaintiffs in their contention that they can use the inadequacy of price to destroy the title of one who bought their land at execution sale.

Taking this view of the matter in controversy, we do not deem it necessary to consider *seriatim* all the exceptions taken by defendants. They are entitled to a new trial, and it is so ordered.

CLARK, J., dissented, and, after stating the facts, said: "The plaintiffs once owned this land. They have not parted with it by conveyance. They have received nothing for it. There is no presumption or limitation against them by possession or lapse of time, nor are they in any way estopped. They have been deprived of the property upon the evidence adduced and according to the facts found by the jury, by a judgment, execution, and sale in a case to which they were not parties. They have not had 'due process of law,' nor has there been any judgment against them according to 'the law of the land.' The plaintiffs having been named as parties to the legal proceedings in which the judgment for costs was rendered under which the land was sold, every presumption is that they were parties. But they have conclusively rebutted that presumption. The jury have found that they were not only not parties to the action, but never had any notice of the proceedings or the judgment and sale.

"Under these circumstances the plaintiffs should recover the land which has never legally passed from them. It is true that when counsel, who are able to respond in damages, represent parties to an action without their authority, the court may uphold the title of an innocent purchaser at a sale under a decree in the cause, because then the owner of the land is not deprived of his property without compensation: *University v. Lassiter*, 83 N. C. 38. But here the counsel is dead, and the essential fact that the plaintiffs can get compensation for their property out of his estate does not appear. They have no remedy except to regain their own. Doubtless the counsel, misled by Polly Williams, honestly thought he represented these parties. Nor is this like the case where there is defective service upon a minor who appears by guardian, which defect is cured by statute: Code, sec. 387; *Harrison v. Harrison*, 106 N. C. 282. The proceeding here was not merely irregular; it was void.

"It should be further noted that in *University v. Lassiter*, 83 N. C. 38, the defendant had been served with process, and being thereby fixed with notice of all orders and decrees in the cause, he was bound by them, and it was his own negligence that he allowed an attorney to appear for him whom he had not authorized. Here these plaintiffs were neither parties, nor had any notice of the pendency of such proceeding."

"In 1 Freeman on Judgments, sec. 120 a, it is said: "Any judgment rendered against one who has neither voluntarily appeared nor been served with process must be treated as void": *Grantham v. Kennedy*, 91 N. C. 148.

"In 1 Freeman on Judgments, sec. 117: 'A void judgment is, in legal effect, no judgment. By it no rights are divested; from it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars anyone. The purchaser at a

sale by virtue of its authority finds himself without title and without redress.'

"In section 128 the learned author discusses the effect of the unauthorized appearance by attorney, and holds that by the weight of authority a judgment based on that ground can be impeached even collaterally. It would be strange if this were not so, since the attorney cannot by acceptance of process bring his recognized client into court. *A fortiori* he cannot by a simple entry on the docket bring in as a party one who is in fact not a client."

"In 2 Freeman on Judgments, sec. 499: The doctrine of the binding effect of the unauthorized appearance of counsel is shown to be repudiated by all of the later cases, as subversive of natural justice."

Mr. Justice Clark then reviewed some of the cases as follows: *Glimes v. Taft*, 98 N. C. 193, only decides that purchasers at judicial sales will be protected against errors and irregularities of the court and the laches of the parties. Nothing of this kind exists in the present case for the reason that the plaintiffs were not parties at all. *Sumner v. Sessions*, 94 N. C. 371, *Edwards v. Moore*, 99 N. C. 1, and *Brittain v. Mull*, 99 N. C. 483, decide that when it appears from the record that a person was a party to the suit, the legal presumption that he was a party is conclusive until removed by a direct attack, and it is not open to collateral attack. In the present case the attack is made directly, for it is the foundation of the action. In *Harrison v. Hargrove*, 109 N. C. 346, it was decided that the purchaser at an execution sale was protected only because of notice which complainants had of the purchase of the land, and of its long occupation by such purchaser, namely, for seventeen years. In the present case nothing of this nature occurred, for immediately upon the discovery of the decree and sale against the plaintiffs they amended their pleadings so as to directly attack the former judgment, and to pray for possession as one of the reliefs asked. In *Morris v. Gentry*, 89 N. C. 248, the court appointed a next friend without notice to the infants or such friend. This was treated as a mere irregularity, which would not affect the title of the purchaser at a sale under execution without notice. In this case there was a judgment to the effect that the infants were parties by such appointment of the next friend. Nothing of the kind exists in the present case, and the case cited does not apply.

The only direct authority that the owner of property can be deprived thereof by virtue of a decree in a case to which he is not a party or privy, and of which he is without notice, is *England v. Garner*, 90 N. C. 197, and this case is directly opposed to *Doyle v. Brown*, 72 N. C. 393. This latter case is "supported by the express provisions of the state and federal constitutions, and by the immutable principles of natural justice, that property shall not be taken from its owner, by virtue of the decree of any court, unless he has opportunity to be heard." It follows that the plaintiffs, never having been made parties to the action, they are not bound by the decree, even in the absence of notice of any fraud or irregularity on the part of the purchaser.

ATTORNEY AND CLIENT. — PRESUMPTION AS TO ATTORNEY'S AUTHORITY TO ACT: See extended note to *McAlexander v. Wright*, 16 Am. Dec. 98. An attorney at law will be presumed to have authority to represent a client in whose name he appears: *Postal etc. Cable Co. v. Louisville etc. R'y Co.*, 43 La. Ann. 522; *Vorce v. Page*, 28 Neb. 294; *Coward v. Clanton*, 79 Cal. 23; *Dorsey v. Kyle*, 30 Md. 512; 96 Am. Dec. 617, and note; *Harshey v. Blackmarr*, 20

Iowa, 161; 89 Am. Dec. 520, and note with cases collected; *Williams v. Uncompahgre Canal Co.*, 13 Col. 469.

EXECUTION SALES — INADEQUACY OF PRICE AS GROUND FOR AVOIDING. A mere inadequacy of price is not sufficient to set aside an execution sale, but it may be considered in connection with other irregularities in the proceedings: *Lurton v. Rodgers*, 139 Ill. 554; 32 Am. St. Rep. 214, and note; and a gross inadequacy in the price may be regarded as indicative of fraud, although it will not be sufficient of itself to avoid the sale: *Smith v. Perkins*, 81 Tex. 152; 26 Am. St. Rep. 794, and note with the cases collected.

HICKS v. BEAM.

[112 NORTH CAROLINA, 642.]

INFANCY — CONTRACTS WITH INFANTS — RIGHT TO AVOID IS PERSONAL PRIVILEGE OF INFANT. — When one contracts with an infant to compensate him for services which are subsequently rendered, the former cannot avoid his obligation to pay by setting up the plea of infancy. The right to avoid the contract on that ground is the peculiar personal privilege of the infant alone.

INFANCY — JUDGMENTS FOR OR AGAINST, WHEN CONCLUSIVE. — When suit is brought for the services of an infant in his own name by his guardian or next friend, the decree is conclusive on him as well as the party for whom he performs the labor, though he might, if no action had been instituted, have disaffirmed the contract on which it is founded, on arriving at majority.

INFANCY — ACTIONS BY INFANTS — DEFENSES. — When an infant, without the intervention of a guardian or next friend, undertakes to prosecute his suit in his own name, the debtor has a right to object to his recovery because the judgment, like the contract, may be repudiated, or affirmed and enforced, at the election of the infant, if rendered before his majority. But such objection must be interposed in apt time by plea in abatement or by answer before the trial on the merits, and if not so pleaded it will be considered as waived.

INFANCY — JUDGMENTS FOR OR AGAINST INFANTS, WHEN BINDING. — When an infant institutes an action in his own name, but before judgment therein, arrives at majority, the judgment is binding on both parties to the action.

ACTION by an infant in his name alone to recover for services rendered. The answer was a general denial. The plaintiff arrived at majority before the judgment appealed from was rendered in his favor.

R. L. Ryburn, for the appellant.

AVERY, J. The defendant having contracted to compensate the plaintiff for his services, which were subsequently rendered, could not avoid the obligation to pay the debt by setting up the plea of plaintiff's infancy. The right to avoid

the contract on that account was a peculiar personal privilege of the infant: *Brown's Domestic Relations*, 106; 10 Am. & Eng. Ency. of Law, 637. While the disability continued, therefore, the contract in this case was binding upon the defendant, though the infant was left at liberty to either affirm or repudiate it at his option, on arriving at full age. Where, however, suit is brought for the services of an infant in his own name by his guardian or next friend, the decree is conclusive on him as well as the party for whom he performs the labor, though he might, if no action had been instituted, have disaffirmed the contract on which it was founded, on arriving at maturity: *Webster v. Page*, 54 Iowa, 461.

When the infant, without the intervention of guardian or next friend, undertakes to prosecute his suit in his own name only, the debtor has a right to object to his recovery, because the judgment, like the contract, may be repudiated or affirmed and enforced at the election of the former, if rendered before his majority: *Schouler's Domestic Relations*, sec. 268; *Tate v. Mott*, 96 N. C. 19. But such objection must be interposed in apt time and in the prescribed mode, which is by plea in abatement, so as to afford an opportunity to the plaintiff, on such terms as the court may deem just, to amend by inserting the name of a guardian or next friend, and thus obviating the difficulty: *Schouler's Domestic Relations*, 449, 450, sec. 449; *Blood v. Harrington*, 8 Pick. 552; *Young v. Young*, 8 N. H. 345; *Drago v. Moso*, 1 Spear, 212; 40 Am. Dec. 592. The defendant relied upon a general denial, which was equivalent to a plea of *nil debet*, and the subject-matter of the action being within the jurisdiction of the court, the defendant would have been required, under the old rules of pleading, to have filed a formal plea in abatement in order to avail himself of the objection to the disability of the plaintiff: *Branch v. Houston*, Busb. 85; *Clark v. Cameron*, 4 Ired. 161. Under the new system, however, such a defense must be in some way (though informally) set up in the answer and insisted on before the trial on the merits, and if not so pleaded it will be considered as waived: *Hawkins v. Hughes*, 87 N. C. 115; *Blackwell v. Dibbrell*, 103 N. C. 270; *Montague v. Brown*, 104 N. C. 161; *Harrison v. Hoff*, 102 N. C. 126; *Pomeroy on Remedies and Rights*, sec. 721.

The defendant in the case under consideration might have set up this preliminary defense along with the general denial, either by memoranda in the nature of a plea or by an

answer in the justice's court, or after appeal in the superior court by leave, and under the rule laid down in the cases which we have cited it was his right to demand that the defense be passed upon in some way before the trial on the merits. Following the suggestion made in *Blackwell v. Dibrell*, 103 N. C. 270, the jury might have been instructed that if they should respond to the issue involving the question whether the plaintiff was an infant in the affirmative, it would be unnecessary to proceed further and pass upon those involving the merits.

It was too late to raise the question by motion to dismiss after the testimony bearing upon the merits had been heard. The defendant may ordinarily get the benefit of the objection that the plaintiff is an infant by motion to amend at this stage of the proceeding, if the court, in its discretion, allows the amendment: *Tredwell v. Bruder*, 8 E. D. Smith, 597. But where the disability still continues, when such motion is made, the usual practice of the court is to protect the infant by allowing him also to amend his summons and complaint by inserting the name of a guardian or next friend: Schouler's *Domestic Relations*, sec. 449. The defendant had waived objection to the disability while it existed by entering and relying upon a general denial of indebtedness as his sole defense, and after the evidence had been heard upon the merits it was, in this particular case, too late to raise it then, even by motion to amend, because, meantime, pending the action, the plaintiff had arrived at full age and had ratified and affirmed all that had been done by his attorney for him in the previous stages of the proceeding by persisting in the prosecution of the action. Where an infant institutes an action in his own name, if, before judgment, he attains full age, or the court allows an amendment to the pleadings inserting the name of a guardian or next friend, in either event the judgment is binding both upon the infant and the defendant: *Reed v. Rossie*, 47 Hun, 153; *Webster v. Page*, 54 Iowa, 461.

We think that the judgment of the court below should be affirmed.

INFANTS — JUDGMENTS AGAINST — NECESSITY FOR GUARDIAN OR NEXT FRIEND. — A judgment cannot be rendered against an infant in a civil action unless he has a guardian who may defend in his behalf: *Johnson v. Waterhouse*, 152 Mass. 585; 23 Am. St. Rep. 858, and note; *Lehew v. Brummell*, 103 Mo. 546; 23 Am. St. Rep. 895; *Griffith v. Ventress*, 91 Ala. 366; 24 Am. St. Rep. 918, and note; *Rogers v. Wolfe*, 104 Mo. 1; *Delashmutt v. Parrent*, 29

Kan. 548; see note to *Alston v. Emmerson*, 29 Am. St. Rep. 644, and extended note to *Joyce v. McAvoy*, 89 Am. Dec. 184-193, where the question is thoroughly discussed.

INFANTS—PRIVILEGE OF TO DISAFFIRM CONTRACTS PERSONAL.—The privilege of infancy is personal, and cannot be urged by one who is not privy in estate with the infant: *Beeler v. Bullitt*, 3 A. K. Marsh. 280; 13 Am. Dec. 161, and note; and see extended note to *Craig v. Van Bobber*, 18 Am. St. Rep. 695, where the subject is discussed fully.

ROSEMAN v. CAROLINA CENTRAL RAILROAD CO.

[112 NORTH CAROLINA, 708.]

RAILROADS—RIGHT TO EXPEL PASSENGER FOR NONPAYMENT OF FARE.—

A conductor in charge of a railway train is authorized to expel, without using unnecessary force, a passenger who refuses to pay regular fare, at any point where he may safely get off, provided he is put off at a usual stopping place or near a dwelling house.

RAILROADS—RIGHT TO EXPEL INTOXICATED PASSENGER.—When a passenger partially intoxicated is expelled from a railroad train by the conductor in charge for a refusal to pay fare and without using force, near a dwelling house and not remote from a station, the company is not liable for his subsequent death from exposure, if the conductor, though knowing of the intoxication, had no reasonable ground to believe that the ejected passenger was physically or mentally unable by reason of his intoxication, to find his way or walk to the nearest house or to the station, and he is not expelled when it is raining or freezing.

RAILROADS—RIGHT TO EXPEL INTOXICATED PASSENGER—DUTY TO CONSULT OPINIONS OF OTHER PASSENGERS.—A railroad conductor in charge of a train is not bound to institute inquiry among the passengers as to the propriety of expelling a partially intoxicated passenger for refusal to pay fare, nor is he bound to act upon their opinions given after such expulsion, when he has no reason to believe that the intoxication has deprived the expelled passenger of the physical or mental capacity to find his way and walk to a neighboring house or to a station in the immediate vicinity.

P. D. Walker, for the appellant.

Jones and Tillett, and D. W. Robinson, for the appellee.

EVERY, J. The plaintiff's intestate got upon the defendant's passenger train at Iron Station, and failing or refusing to produce a ticket or pay fare on demand of the conductor, was ejected a little more than a half mile from that place and within two hundred yards of a dwelling house. There was testimony tending to show that the intestate appeared to be drunk at the station while the passengers were taking supper there, and had come as a passenger from Stanley to Iron Station (about twenty-one miles) on the same train, having pur-

chased a ticket from one station to the other. The conductor testified that he considered him neither sober nor drunk, and a witness for the plaintiff corroborated his statement that the intestate when ordered to get off the train followed him to the platform and then stepped off without assistance from the brakeman, who held his lamp for him to see in alighting. The only direct evidence as to the nature of the ground where he was ejected was that of the conductor, who said that he went down an embankment about three feet high. He was found next morning frozen and in the water that had collected near the center of an embankment eight feet high, three-fourths of a mile from the station.

Where there is no statute prescribing where or when recalcitrant or disorderly passengers must be ejected, the officer in charge of trains, as a rule, is authorized to expel, without using unnecessary force, one who refuses to pay regular fare, at any point where he may safely get off: *Pickens v. Richmond etc. R. R. Co.*, 104 N. C. 812; *Clark v. Wilmington etc. R. R. Co.*, 91 N. C. 506; 49 Am. Rep. 647. The statute (Code, sec. 1962) affirms this right, subject to the limitation that the expulsion must be either "at any usual stopping place or near any dwelling house, as the conductor shall elect, on stopping the train." It is admitted that the plaintiff's intestate was put off, without using force, near a dwelling house, and not remote from a station. But where the power expressly given by law is exercised in such a manner as to willfully and wantonly expose the ejected person to danger of life or limb, the company is still liable for injury or death resulting from the expulsion. Cases, falling within this last exception to the general rule and not intended to be included under the statute, arise where the persons ejected are manifestly too infirm to travel or too much intoxicated to be trusted to find the way to the nearest house or station: 8 Wood's Railway Law, sec. 362; 2 Shearman and Redfield on Negligence, sec. 493; *Toledo etc. R'y Co. v. Wright*, 68 Ind. 586; 34 Am. Rep. 277.

The question, therefore, which first confronts us is whether in any view of the testimony the conductor had reasonable ground to believe that the plaintiff's intestate was so greatly under the influence of liquor as to be unable to find his way or walk to the nearest house or to the station. He was put off the train on the night of the 16th of November, 1889. According to the testimony of Miller for plaintiff and that of the conductor, it was not raining, nor was it freezing at that

early hour of the evening, though later in the night there was sleet, and the ground was frozen next morning. The conductor had heard intestate's demand for food at the supper house and had seen him supplied. He next saw that he had got on the train and found him awake and declaring that he had neither money nor ticket. When told that he must get off the intestate arose, walked to the platform and got off without assistance. Under such circumstances was it the duty of the conductor to take him free of charge to the next station, lest he should drink more, or the intoxicants that he had already drunk should take effect and subsequently render him unable to travel? We think not.

It was but natural to infer that one who could find his way to the eating house and demand food and thence into the train again could follow a road hard by when he was put off, and which it seems the conductor knew led to his father's house only a short distance off. His boisterous behavior at the station, so far as it seems to have come under the observation of the conductor, clearly indicated that it might become necessary to expel him for disorderly conduct, but was not calculated to excite apprehension that he might prove physically unable to return to the station or reach a house in the immediate vicinity of the point where he got off. The statement of the conductor that he saw him land without assistance "safe upon the ground" being undisputed by any direct evidence, the conductor was warranted in acting upon the supposition that he would seek and reach a place of safety. Had he shown symptoms of infirmity or of stupor in presence of the conductor, or had there been any dispute as to what the demeanor of the intestate had been in his presence, it might have been for the jury to determine whether the conductor had reason to believe he was physically or mentally incapacitated for traveling by reason of intoxication. Waiving the objection to the competency of the question propounded to Alderman by the witness Miller, just after the deceased was expelled, we think that the answer of the former, "Oh, no; he lives near here, and it is only a few hundred yards to the station," sufficiently shows the reasonableness of his course from his own standpoint. It would place a premium upon drunkenness and subject companies and passengers to needless delay and danger if officers in charge of trains were bound, in order to save the companies harmless, to act upon an offhand opinion ventured by a

passenger instead of their own well-founded view of the situation, and stop the train to hunt for or pick up an ejected trespasser. This is one of the thousands of terrible casualties due to the immoderate use of spirituous liquors. If there is a moral accountability at the door of any person other than the victim, or should be a legal liability elsewhere, we see no ground for saddling the responsibility upon a common carrier whose conveyances are so frequently resorted to by such boisterous and violent men to the annoyance of sober and orderly passengers. We are unwilling to lay down the principle that a conductor subjects his company to liability for refusing to act upon the volunteer opinion of any passenger as to the physical or mental state of a drunken man who has been expelled.

We think that there was no evidence, competent or incompetent, that fairly raised the question whether the conductor had reasonable ground to believe that the intestate was too infirm, by reason of intoxication, to reach a place where he would be safe, and upon the answer to that inquiry the liability of the company depended. In the absence of any sufficient testimony to make the company liable for willful disregard of the intestate's danger on the part of Alderman, we think that the court below erred in submitting the case to the jury at all. In this view of the evidence it is unnecessary to mention particular prayers for instructions, or exceptions arising from the refusal to give them.

In the most favorable aspect of the testimony for the plaintiff, the conductor had notice that the deceased was drinking and disposed to be quarrelsome at the station, and saw that he was under the influence of liquor when he was expelled from the train; but there was no evidence of physical infirmity or mental incapacity, such as to excite a reasonable apprehension that he would be unable to walk to a house or to his home. Alderman was not bound, because of what he did see and hear, to institute inquiry among the other passengers, before ejecting the intestate, or to act upon their opinions given afterwards, when he had no reason to believe that the intoxication had deprived the intestate of the mental capacity to find his way, or the physical power to follow it to a neighboring house or to the station. However much such accidents are to be deplored, justice and public policy alike forbid that the failure of the conductor in charge of a train to consult the fellow passengers of a man who refuses to pay fare

and appears to be somewhat intoxicated, as to his ability to provide for his own safety, shall be declared negligence, such that a jury are at liberty to find it the proximate cause of injury or death befalling him after expulsion.

For the reasons given we think there was error in submitting the question of defendant's negligence to the jury at all upon the evidence, and the defendant is therefore entitled to a new trial.

RAILROAD COMPANIES. — RIGHT TO EXPEL PASSENGER FOR NONPAYMENT OF FARE: See, generally, notes to *Commonwealth v. Power*, 41 Am. Dec. 476-478; and *Chicago etc. R. R. Co. v. Parks*, 68 Am. Dec. 570-573. The common-law rule is, that a passenger may be put off a train at a place other than a depot, provided care is taken not to expose the person to injury or danger: *Jeffersonville R. R. Co. v. Rogers*, 28 Ind. 1; 92 Am. Dec. 276; *McClure v. Philadelphia etc. R. R. Co.*, 34 Md. 532; 6 Am. Rep. 345; *Atchison etc. R'y Co. v. Ganta*, 38 Kan. 608; 5 Am. St. Rep. 780; *Texas Pac. R'y Co. v. James*, 82 Tex. 306; but in many states there is a statutory requirement that the right shall be exercised at a regular station or near a dwelling house. In *Louisville etc. R. R. Co. v. Sullivan*, 81 Ky. 624, 50 Am. Rep. 186, a railroad company was held liable for the act of a conductor in expelling, between stations, a drunken passenger whose helpless condition was manifest, the result being that he was severely frozen.

RUMBOUGH v. SOUTHERN IMPROVEMENT COMPANY.

[112 NORTH CAROLINA, 751.]

CORPORATIONS — AUTHORITY OF OFFICER TO BIND. — The officers of a corporation, from the highest to the lowest, are only its agents, and their acts and contracts made for their principal are binding upon it only when within the scope of their authority, express or implied.

CORPORATIONS — EVIDENCE OF POWER OF OFFICER TO BIND. — The scope of the authority of an officer, or agent of a corporation, as to a past transaction, cannot be proved by the unsworn declarations of another officer or agent.

CORPORATIONS — EVIDENCE — DECLARATIONS OF ONE OFFICER AS TO AUTHORITY OF ANOTHER. — In an action on a draft, drawn by one officer of a corporation and accepted by him in the name of the corporation, the declarations of another officer thereof, made after such acceptance, are inadmissible in evidence to show the former officer's authority to bind the corporation.

EVIDENCE — CONTENTS OF LETTER. — Parol evidence of the contents of a letter, to prove a contract, is inadmissible unless the letter is produced, or its loss or destruction accounted for.

J. M. Gudger, T. F. Davidson, O. M. Busbee, and F. A. Sondley, for the appellant.

W. W. Jones and H. T. Rumbough, for the appellee.

BURWELL, J. The plaintiff's action is founded upon a draft drawn in his favor by W. E. Watkins for the sum of nine hundred fifty dollars and accepted by said Watkins in the name of the defendant corporation. It was necessary to the establishment of his claim that plaintiff should prove that Watkins had authority to bind the defendant in this manner. In his effort to do this he was allowed on the trial, notwithstanding the objection of defendant, to introduce the declarations of the president and general manager of defendant company, made after the alleged acceptance, to the effect that Watkins had authority so to contract for the defendant. This was not proper: *Smith v. North Carolina R. R. Co.*, 68 N. C. 107. It is there said that, "the power to make declarations or admissions in behalf of a company as to events or defaults that have occurred and are past cannot be inferred as incidental to the duties of a general agent to superintend the current dealings and business of the company. No such power is expressly given by the by-laws of defendant company, and a general power so unusual and so unnecessary in the ordinary business of a company must require a clear and distinct grant." In that case the declaration offered was that of the superintendent, who "had authority from the president and directors of the road to arrange and alter the tariff of freights, and generally to make all other contracts with shippers over the road," and the controversy was in relation to a contract for the shipment of freight. Here, it is true, the declarations introduced were those of the president. But the name of the officer cannot change the rule. It is a question not of name but of authority. Officers of corporations, from the highest to the lowest, are only the agents of such corporations. What acts they perform and what contracts they make for their principals are binding if within the scope of their particular authority, express or implied; but the scope of the authority of one officer or agent, as to a past transaction at least, cannot be proved by the unsworn declaration of another officer or agent. The objection to the admissibility of such testimony is obvious.

It appears from the statement of the case on appeal that some of the declarations of the president of defendant company, as to the authority of Watkins to accept this draft, as we understand the record, were contained in a letter written by him, and the objection was made that the contents of the

letter should not be spoken of, because it was not produced, nor was its nonproduction properly accounted for.

If the contents of this letter were relied on by plaintiff merely as a declaration by the president that Watkins had authority to accept the draft, they were incompetent whether the letter was produced or not, for the reasons above stated.

If its contents were to be used as proof of a contract on the part of the company that it would acknowledge and pay the draft, then it was very clearly improper to allow the witness to speak of the contents, the letter not being produced, unless its loss was accounted for according to the rules of law, for, in that view of the matter, this was to allow parol testimony to establish what was contained in a written agreement without first proving that the writing was lost or destroyed.

Inasmuch as the defendant is entitled to a new trial for the error above pointed out, we do not deem it necessary to consider any other of the numerous exceptions taken by its counsel.

CORPORATIONS, DECLARATIONS OF AGENTS, HOW FAR EVIDENCE AGAINST. The declarations of the officers of a bank are not evidence against it, unless authorized by the directors: *Stewart v. Huntington Bank*, 11 Serg. & R. 267; 14 Am. Dec. 628; *Cunningham v. Cochran*, 18 Ala. 479; 52 Am. Dec. 230; and the directors can act in behalf of the corporation only as a board. Their power is not joint and several, but joint only: *Buttrick v. Nashua etc. R. R. Co.*, 62 N. H. 413; 13 Am. St. Rep. 578; *Hartford Iron Mtn. Co. v. Cambria Mtn. Co.*, 80 Mich. 491. Admissions of the president will be evidence against the corporation, if made by him in the execution of his duties about the business of the company, and within the scope of the authority usually exercised by him: *Chicago etc. R. R. Co. v. Coleman*, 18 Ill. 297; 68 Am. Dec. 544.

CASES
IN THE
SUPREME COURT
OF
OHIO.

DIEM v. KOBLITZ

[40 OHIO STATE, 41.]

SALES ON CREDIT — PROPER TIME FOR DELIVERY OF THE GOODS. — When the purchaser of goods sold on credit agrees to give his negotiable paper for the price, but no time has been specified for delivery, the obligation of the vendor is to deliver the goods upon receipt or tender of such negotiable paper, and not at the time to which credit is extended.

SALES — STOPPAGE IN TRANSITU, RIGHT OF, WHEN ARISES. — The right of stoppage *in transitu* is the right of the vendor to resume possession of the goods sold while they are in transit to the vendee, who is insolvent, or in embarrassed circumstances. Actual insolvency is not essential. It is sufficient if, before the stoppage, the vendee was either in fact insolvent or had, by his conduct in business, afforded the ordinary apparent evidences of insolvency.

SALES — STOPPAGE IN TRANSITU, RIGHT OF, NOT AFFECTED BY ACCEPTANCE OF VENDEE'S NEGOTIABLE PAPER. — The vendor's right of stoppage *in transitu* is not abridged, nor in any way affected, by the circumstance that he has received the vendee's bill of exchange, or other negotiable securities, for the whole price, even though they have been negotiated, and are still outstanding.

SALES — STOPPAGE IN TRANSITU, RIGHTS OF VENDOR, HOW AFFECTED BY. The effect of the exercise of the right of stoppage *in transitu* is to restore the vendor to precisely the same position as if the property had never left his hands. He has the same rights with regard to it, and those rights may be enforced in the same way.

SALES ON CREDIT — OBLIGATION OF VENDEE TO KEEP HIS CREDIT GOOD. Since the promise of the vendee to pay at a future day involves an engagement on his part that he will remain and then be able to pay, it is one of the implied conditions in a contract for the sale of goods on credit that he shall keep his credit good. That engagement is broken when he becomes insolvent, and hence arises the right of the vendor to stop the performance of the contract on his part.

SALES — MUTUAL DUTIES AND OBLIGATIONS OF THE VENDOR AND VENDEE AFTER A STOPPAGE IN TRANSITU. — Stoppage *in transitu* of goods sold on credit does not rescind the contract; but unless the vendee is ready to perform the contract on his part by paying the price when the time for delivery arrives, he cannot require the seller to perform the contract on his part by completing the delivery.

SALES ON CREDIT — VENDOR, WHEN JUSTIFIED IN RESELLING PROPERTY SOLD. — Where goods are sold on credit, but no express stipulation is made as to the time of delivery, the vendor, upon ascertaining, while the goods are still in his hands or in the custody of the carrier, that the vendee is insolvent, is entitled not merely to retain or to resume possession of the goods, but also to resell them without waiting for the expiration of the period of credit. The insolvency of the vendee, under these circumstances, amounts to such inability on his part to perform the contract as will justify the vendor in treating the agreement for credit as at an end, and, therefore, no action for damages can be maintained by the former against the latter for failure to deliver the goods.

ACTION by vendee against vendor for damages alleged to have been caused by a resale of goods stopped *in transitu*.

Thomas McDougall, for the plaintiff in error.

Henry C. Oettinger and Frank Seinsheimer, for the defendant in error.

WILLIAMS, C. J. The contract of the parties, as shown by the pleadings, was one for the sale of goods on credit, the plaintiffs agreeing to give their commercial paper for the purchase price, payable at the times stipulated. As no time was specified in the contract for the delivery of the goods, the defendants' obligation was to deliver them when the plaintiffs gave their commercial paper, as they agreed to do, or within a reasonable time. The petition avers that the plaintiffs were at all times ready to perform their part of the contract, and that they requested performance by the defendant, which was by him refused. The answer denies these averments, and alleges that the plaintiffs became, and were insolvent, and their commercial paper dishonored; and upon this information coming to the defendant after part of the goods had been delivered to the carrier for shipment, he stopped them in transit, resumed possession, and afterwards resold them, with the other goods included in the contract, for the same price plaintiffs were to pay for them. The reply denies the insolvency of the plaintiffs, and avers that they accepted drafts drawn by defendant on them for the whole purchase price of the goods, payable in accordance with the contract.

The view which the court below took of the case was that

the resale of the goods, as alleged in the answer, was a breach of the contract by the defendant, which gave the plaintiffs, notwithstanding their insolvency, an immediate right of action against him for damages. Hence, proof of the insolvency of the plaintiffs was excluded as immaterial, and the case was submitted to the jury as involving no inquiry except the amount of the plaintiffs' damages.

We do not understand it to be claimed that the defendant, upon learning of the plaintiffs' insolvency, might not lawfully retake the goods while they were yet in the custody of the carrier; nor that he was bound to deliver any part of the goods so long as the insolvency of the plaintiffs continued. The claim is, that the right of the vendor in such case is simply to retain possession of the property until the purchase price is paid; and therefore a resale by him before the expiration of the credit puts it out of his power to deliver to the first vendee, and so constitutes a breach of the contract with him, for which he may, though insolvent, maintain a special action for damages. Whether this claim is correct or not is the principal question in the case.

The right of stoppage *in transitu* is the right of the vendor to resume possession of the goods sold while they are in transit to the vendee, who is insolvent or in embarrassed circumstances. Actual insolvency of the vendee is not essential. It is sufficient if, before the stoppage *in transitu*, he was either in fact insolvent, or had, by his conduct in business, afforded the ordinary apparent evidences of insolvency. Nor is the vendor's right abridged or in any way affected by the fact that he has received the vendee's bills of exchange or other negotiable securities for the whole price, even though they have been negotiated and are still outstanding. It seems to be well settled that when the right of stoppage *in transitu* is properly exercised, the effect is to restore the vendor to precisely the same position as if the goods had never left his possession. He has the same rights with respect to the property, and they may be enforced in the same way. His right to intercept the goods before they reach the hands of the vendee, and his right to withhold those still in his possession, rest upon the same just principle that the insolvent vendee cannot require the vendor to deliver the goods or perform the contract when he himself is unable to pay for them or perform the contract on his part. To require the goods to be delivered to such vendee would simply result in the application of the

property of one man to the payment of another man's debts. The right of the unpaid vendor with respect to the goods is sometimes called a lien; and it is a lien in the sense that the vendee, upon payment or tender of the price, but not otherwise, may recover them. But it is something more than a mere common-law lien, which is only a naked right of possession. With the goods in his possession the vendor has a special property in them, which is parcel of his original ownership. Whether the effect of the stoppage *in transitu*, or the retention of the goods by the vendor, on the discovery of the vendee's insolvency, is to rescind the contract or not, has been the subject of much discussion, and some authors say the question is not yet definitely settled. But the prevailing opinion now is, we believe, that the contract is not necessarily rescinded unless the parties, by their conduct, so treat it; that conclusion, being most favorable to the vendor, for whose protection the doctrine of stoppage *in transitu* was first established; for if the exercise of the right operated to rescind the contract, the vendor would be deprived of the remedy which it is now generally conceded he has, in a proper case, upon a resale of the goods, to hold the vendee, or the assignee of his estate, for the loss sustained through his nonperformance of the contract, or in consequence of a fall in the market price. And as the stoppage does not rescind the contract of sale, it follows that the vendee or his assignee may obtain the goods on payment of the price; or if the vendee was able and ready to perform the contract on his part, he may recover damages for the failure of the seller to deliver the property according to its terms. But can the vendee maintain such action if he is not able to perform? And does his insolvency at the time fixed for the delivery of the property amount to such inability? Or, where the sale is upon credit, does a resale of the property by the vendor, before the expiration of the time of the credit, give the insolvent vendee, notwithstanding his inability to pay for the goods, a right of action against the vendor for the difference between the contract price and their market value at the time of the resale? As an authority sustaining the right of the vendee to maintain such an action against his vendor, *Bloxam v. Sanders*, 4 Barn. & C. 941, is cited, where Bailey, J., says: "If goods are sold upon credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the right of possession and the right of property vest at once in him; but

his right of possession is not absolute; it is liable to be defeated if he becomes insolvent before he obtains possession. Whether default in payment when the credit expires will destroy his right of possession, if he has not before that time obtained actual possession, and put him in the same situation as if there had been no bargain for credit, it is not now necessary to inquire, because this is a case of insolvency, and in case of insolvency the point seems to be perfectly clear. If the seller has dispatched the goods to the buyer, and insolvency occurs, he has a right in virtue of his original ownership to stop them *in transitu*. Why? Because the property is vested in the buyer so as to subject him to the risk of any accident; but he has not an indefeasible right to the possession, and his insolvency, without payment of the price, defeats that right. And if this be the case after he has dispatched the goods, and whilst they are *in transitu*, *a fortiori*, is it when he has never parted with the goods, and when no *transitus* has begun. The buyer, or those who stand in his place, may still obtain the right of possession if they will pay or tender the price, or they may still act upon their right of property if anything unwarrantable is done to that right. If, for instance, the original vendor sells when he ought not, they may bring a special action against him for the injury they sustain by such wrongful sale, and recover damages to the extent of that injury; but they can maintain no action in which right of property and right of possession are both requisite unless they have both those rights." Still the question remains, when is the resale wrongful? And what is necessary on the part of the vendee to enable him to maintain the action, for the resale was not decided, nor does it appear to have been a question in that case. The action was *trover*, to the maintenance of which the right of possession was essential.

In 1 Smith's Lead. Cas., pt. 2, 1199, in the note to *Lickbarrow v. Mason*, 2 Term Rep. 63, it is said: "Supposing the contract of sale not to be rescinded, it seems to follow that the goods, while detained, remain at the risk of the vendee, and that the vendor can have no right to resell them, at all events until the period of credit is expired; after that period, indeed, the refusal of the vendee or his representatives to receive the goods and pay the price would probably be held to entitle the vendor to elect to rescind the contract." The only authority cited in support of the note above quoted is the case of *Langford v. Tiler*, 1 Salk. 113, from an examina-

tion of which it will be seen that it does not meet the question. The full report of the case, which is very brief, is as follows:—

“The defendant, who was administratrix to her late husband, used to deal in tea in his lifetime, and bought four tubs of the plaintiff at so much per tub, one of which she paid for and took away, leaving fifty pounds in earnest for the other three; and Chief Justice Holt ruled: 1. That the husband was liable upon the wife’s contract, because they cohabited; 2. That notwithstanding the earnest, the money must be paid upon the fetching away the goods, because no other time for payment is appointed; 3. That earnest only binds the bargain, and gives the party a right to demand; but then a demand without the payment of the money is void; 4. That after earnest given the vendor cannot sell the goods to another, without a default in the vendee, and therefore, if the vendee does not come and pay and take the goods, the vendor ought to go and request him; and then if he does not come and pay and take away the goods in convenient time, the agreement is dissolved, and he is at liberty to sell them to any other person.” The sale, it appears, was not on credit, nor was the purchaser insolvent; nor does the case hold that the vendor would be liable in damages for a resale of the goods, without a request made of the vendee to receive and pay for them, if at the time he was not ready and able to pay the purchase price. On the contrary, the action was by the vendor against the vendee, who was the administratrix of her husband’s estate, to charge the estate with her contract of purchase; and Lord Holt was speaking of what was necessary to be done by the vendor to enable him to sue for the vendee’s breach in not making full payment. The holding that to entitle the seller to sue he must offer to perform and request performance by the purchaser, is in accordance with the now generally recognized rule on the subject.

The general rule is that in contracts of bargain and sale, where there is no agreement for credit, the promise of the vendor to sell and deliver the property, and that of the purchaser to pay the contract price, are mutually dependent, and neither party is bound to perform, without contemporaneous performance by the other. Payment or tender of the price is the condition upon which the purchaser can require delivery of the property; and delivery or tender by the seller is just as essential on his part if he would sue for the price or

for damages for its nonpayment. If both parties are unable to perform, neither can maintain an action against the other; and therefore, while it is necessary for the vendor, if he would sue, to offer performance on his part, he is in a position to defend, without doing so, if the vendee is not able to perform. In *Reader v. Knatchel*, 5 Term Rep. 218, an application was made of the rule, which is much in point. The plaintiff declared upon an agreement by the defendant to deliver to him a quantity of Manchester cottons. The defense was, that after the making of the contract the plaintiff had compounded with his creditors. Mr. Justice Butler directed the jury, "that if they believed the plaintiff was really in such a situation as to be unable to pay for the goods, that was a good defense in point of law to the action; and the jury accordingly found a verdict for the defendant."

When the sale is upon credit, it is one of the implied conditions of the contract that the vendee shall keep his credit good; his promise to pay at a future day, involving an engagement on his part that he will remain and then be able to pay; which engagement is broken when he becomes insolvent and unable to pay, and hence the right of the vendor to then stop performance of the contract on his part. Nor is the rule varied by the fact that the vendee has given his notes or bills or other securities for the price, payable at the end of the time for which the credit is allowed. The vendor in such case incurs no liability by not delivering the property, unless the vendee pay or tender the contract price. But in order to sue the vendee, he should offer to deliver according to the contract. Such is the scope of the rule laid down in *Florence Min. Co. v. Brown*, 124 U. S. 385, where it is held: "The insolvency of the vendee in a contract for the sale and future delivery of personal property in installments, payment to be made in notes of the vendee as each installment is delivered, is sufficient to justify the vendor for refusing to continue the delivery unless payment be made in cash; but it does not absolve him from offering to deliver the property in performance of the contract if he intends to hold the purchasing party to it; he cannot insist upon damages for nonperformance by the insolvent without showing performance on his own part, or an offer to perform, with ability to make the offer good."

The rule must work both ways. The rights and obligations of the vendor and vendee are correlative. If the insolvency

of the vendee is sufficient to justify the vendor in refusing to deliver the property unless payment be made in cash, it follows that the vendor incurs no liability by his refusal, and therefore no right of action accrues to the vendee unless payment be made by him. And if the vendor cannot insist upon damages for the vendee's nonperformance without showing an offer on his part with the ability to perform, so neither can the vendee, if he is without the ability to perform, recover from the vendor. The observations of Gholson, J., in *Benedict v. Schaettle*, 12 Ohio St. 520, 521, are in point, and are in harmony with this view of the subject. He says: "If the true principle of the right of stoppage *in transitu* be found in that certainly just rule of mutual contract, by which either party may withhold performance, on the other becoming unable to perform, on his part; if the foundation of the rule be a just lien on the goods for the price until delivered, an equitable lien adopted for the purposes of substantial justice, then it is the ability to perform the contract—to pay the price—which is the material consideration. If there be a want of ability, it can make no difference in justice or good sense whether it was produced by causes or shown by acts at a period before or after the contract of sale. Substantially, to the vendor who is about to complete delivery and abandon or lose his proprietary lien the question is, can the vendee perform the contract on his part? has he from insolvency become unable to pay the price?" And in another part of the opinion he further says: "The rights of a fair vendee will be sufficiently protected by giving him an indemnity when the right of stoppage *in transitu* is exercised upon rumor or suspicion without any foundation in fact, and by depriving the vendor in all cases of any chance of speculating upon the goods, by requiring them to be delivered or accounted for to the vendee or his assignee on the payment or tender of the agreed price."

But it is contended that while the vendor may refuse to deliver the property to the insolvent vendee, he is obliged to keep it for the vendee until the time of the credit expires; and if he resell before that time, the vendee may have his action for damages.

When, by the contract, the property is to be delivered at a future day, and the vendor sells it to another before that time arrives, the vendee, being able to perform, may have an immediate action; for the vendor, by thus disabling himself

from performing by delivery at the proper time, commits a breach of the contract, and the vendee need not wait until the time for the delivery arrives. But that rule has no application here. The obligation of the vendor, under a contract like that between the parties in this case, is to deliver the goods at the time stipulated in the agreement, which is at once, upon the receipt or tender of the purchaser's commercial paper, or within a reasonable time; not at the time to which the credit is extended. The right of the vendee, is to receive the goods at the time the vendor contracts to deliver them, and he is not bound to receive them at any other time. The breach, therefore, on the part of the vendor, if there be one, consists in his failure to deliver the goods according to the contract, and occurs at that time, and not upon a resale subsequently made; and the vendee's cause of action arises, if at all, upon the failure to deliver, and not on the resale. In the case now before us, the averments of the defendants' answer, which on the trial he was not permitted to prove, though he offered to do so, show that at the time the goods were to have been delivered, according to the contract of sale, the plaintiffs were insolvent, and their paper dishonored, so that the condition upon which their right to the goods depended, had not been performed by them, and they were without the necessary ability to perform the same. Upon what just principle can the seller in such a case be required to hold the goods until the expiration of the credit? It is true that, at that time, the vendee may again be solvent, and able to pay. There is no presumption or assurance that he will. If any presumption arises, it is rather, that the insolvency will continue, which is more in accordance with the experience of the commercial world. But, as we have seen, it is part of the vendee's engagement, that he will maintain his credit, which is broken by his insolvency. And it would be unjust to require the vendor to sustain the loss resulting from the destruction or deterioration of the goods in the meantime, which, in many instances, must ensue if the seller is compelled to keep the goods shut up, and take the risk of the future solvency of the buyer. The injustice of such a requirement is conceded where the goods are of a perishable nature; and the vendor, it is now settled, is not obliged to keep goods of that character until the termination of the credit. In the notes to *Lickbarrow v. Mason*, in 1 Smith's Lead. Cas. pt. 2, 1199, it is said: "But what, it will be said, if the goods be of

so perishable a nature that the vendor cannot keep them until the time of credit has expired? In such a case it is submitted that courts of law having originally adopted this doctrine of stoppage *in transitu* from equity, would act on equitable principles by holding the vendor invested with an implied authority to make the necessary sale." It is insisted, however, that the right of sale in such cases constitutes an exception to the rule. In our opinion, the reasons upon which the exception rests, if it be such, should make the exception the general rule. The value of many kinds of merchandise, not perishable, depends largely upon their being in the market at the appropriate seasons, and to supply temporary demands; and if not available for those purposes, at the proper time, they become comparatively worthless, or so reduced in value as to entail great loss, which may be less only in degree, though greater in amount, than where the goods are perishable; and it is no more just or equitable, to subject the vendor to the loss in the one case, than in the other. The right of resale, ought not, we think, be made to depend upon the degree or extent of the loss that must ensue, if it should be denied. It rests upon a different principle, and grows out of the failure of the vendee to keep his engagement. Not that the contract is thereby rescinded, for that would defeat the vendor's remedy for damages upon resale after due notice; but, that he may elect to treat the agreement for the credit as at an end, on account of the vendee's default. We see no good reason for holding that the rights of the seller are any the less where the sale is upon credit, and the property is retained by him on account of the buyer's insolvency, than they would be if the sale were for cash, and the vendee was unable to pay the price agreed upon. In either case the incapacity of the vendee to perform his part of the agreement, and insolvency is incapacity, warrants the vendor in withholding performance on his part.

We are therefore of opinion the trial court erred in excluding the evidence of the plaintiffs' insolvency, and in charging the jury as shown in the statement of the case; and also in refusing the instruction requested by the defendant therein contained. Counsel have argued a question relating to the charge of the court on the measure of damages; but as no exception was taken to the charge on that subject it will not be further noticed. For the errors mentioned above, the judgments below are reversed and the cause remanded for further proceedings.

SALES — STOPPAGE IN TRANSITU — WHEN RIGHT ARISES. — The right of stoppage *in transitu* arises where the seller of chattels learns of the insolvency of the purchaser while the goods are on their way to the latter, but before they actually pass into his possession: *Kingman v. Denison*, 84 Mich. 608; 22 Am. St. Rep. 711, and note; *Schuster v. Carson*, 28 Neb. 612; *Farrell v. Richmond etc. R. R. Co.*, 102 N. C. 390; 11 Am. St. Rep. 760, and note; *Jones v. Earl*, 37 Cal. 630; 99 Am. Dec. 338, and note; *Blum v. Marks*, 21 La. Ann. 268; 99 Am. Dec. 725, and note; *Sawyer v. Joslin*, 20 Vt. 172; 49 Am. Dec. 768, and note. See also extended notes to *Hause v. Judson*, 29 Am. Dec. 384, and *Rucker v. Donovan*, 19 Am. Rep. 88.

THE RIGHT OF STOPPAGE IN TRANSITU IS NOT AFFECTED by taking bills, drawn by the master of the ship carrying the goods, upon the vendee: *Newhall v. Vargas*, 13 Me. 93; 29 Am. Dec. 489; and for a further discussion of the effect upon the right of stoppage *in transitu* the taking of notes, security etc., has, see the note to *Hause v. Judson*, 29 Am. Dec. 387.

SALES — STOPPAGE IN TRANSITU — EFFECT OF ON VENDOR'S RIGHTS. — A vendor may, notwithstanding his exercise of the right of stoppage *in transitu*, maintain an action against the vendee for goods bargained and sold, provided he be ready to surrender the goods according to the terms of the original contract: *Patten's Appeal*, 45 Pa. St. 151; 84 Am. Dec. 479, and note. Stoppage *in transitu* simply restores the vendor to his lien by placing him in the same position as if he had never parted with possession: *Newhall v. Vargas*, 15 Me. 314; 33 Am. Dec. 617; *Pennsylvania R. R. Co. v. American Oil Works*, 126 Pa. St. 485; 12 Am. St. Rep. 885.

STATE v. STANDARD OIL COMPANY.

[49 OHIO STATE, 187.]

CORPORATIONS, HOW FAR REGARDED AS MERE LEGAL ENTITIES DISTINCT FROM THE STOCKHOLDERS. — The doctrine that a corporation is a legal entity existing separate and apart from the natural persons composing it is a mere fiction, introduced for purposes of convenience and to subserve the ends of justice. Hence, where that fiction is urged to an end subversive of its policy, or such is the result of giving effect to it, it must be ignored, and an averment that a certain act has been done by the stockholders, simply as individuals, and to promote their individual interests, cannot preclude judicial inquiry as to whether the act in question was really done by them in the capacity and for the purposes alleged, or was, as a matter of fact, done to control the corporation, and affect the transaction of the corporate business, in the same manner as if the act had been clothed with all the formalities of a corporate act.

CORPORATIONS — ULTRA VIRES, PENALTIES OF, WHEN INCURRED THROUGH ACTS OF INDIVIDUAL STOCKHOLDERS. — Where all, or a majority, of the stockholders comprising a corporation, do an act which is designed to affect the property and business of the company, and which through the control their numbers give them over the selection and control of the corporate agencies, does affect the property and business of the company, in the same manner as if it had been a formal resolution of the board of directors; and the act so done is *ultra vires* of the corporation and against public policy, and was done by them in their individual capacity

for the purpose of concealing their real purpose and object; the act should be regarded as the act of the corporation, and to prevent the abuse of corporate power, may be challenged as such by the state in a proceeding in *quo warranto*.

TRUSTS — AGREEMENT BETWEEN STOCKHOLDERS OF COMPANIES, WHAT VOID AS TENDING TO MONOPOLY. — An agreement by which a majority of the stockholders in several companies transfer their stock to trustees, who are required to hold the stock in trust for the transferors, and to exercise the power of controlling the affairs of the companies which the legal ownership of the majority of the stock confers, in such a manner as will be most conducive to the interests of all the parties to the agreement, tends to establish a virtual monopoly of the business for which the companies were organized, and is therefore contrary to public policy and void.

STATUTE OF LIMITATIONS — WANT OF KNOWLEDGE WILL NOT STOP THE RUNNING OF. — The only exception to the general rule, that a party's want of knowledge does not prevent the running of the statute of limitations against an action that has accrued in his favor, is where there has been fraud or concealment on the part of the defendant. This exception under the Ohio statute (sec. 4982), is expressly confined to "an action for relief on the ground of fraud."

STATUTE OF LIMITATIONS — PROCEEDINGS IN QUO WARRANTO, WHEN BARRED BY. — Under the Ohio statute regulating proceedings in *quo warranto*, an action against a corporation for the forfeiture of its charter must be brought "within five years after the act complained of was done or committed"; but the right of the state to bring an action for the purpose of ousting a corporation from "the exercise of a power or franchise under its charter" is not barred until such power or franchise has been exercised for twenty years.

PROCEEDING in *quo warranto* for the purpose of determining whether the defendant corporation had, by becoming a party to a certain agreement alleged to be contrary to public policy, rendered itself liable to be deprived of its corporate franchises. The substance of the agreement was as follows: 1. Parties to it shall embrace three classes — the first comprising all the stockholders of certain corporations and limited partnerships (whereof the defendant company was one), the second being composed of certain specified individuals, and the third consisting of a portion of the stockholders of certain corporations and limited partnerships; 2. Corporations shall as soon as practicable be formed in certain states (of which Ohio was one), but any existing charter and organization may be used when it could advantageously be done; 3. The shares of stock of such corporations shall be issued only for money, property, or assets, equal at a fair valuation to the par value of the stock delivered therefor; 4. All of the property, real and personal, assets and business of each and all of the corporations and limited partnerships embraced in

the first class shall be transferred to and vested in the several Standard Oil Companies of the states to which those corporations and partnerships belong, and the directors and managers thereof are, in order to carry out that transfer, authorized by the stockholders and members (all of them being parties to the agreement), to assign, for the consideration to be afterwards mentioned, to the Standard Oil Company or companies of the proper state or states, as soon as said corporations are organized and ready to receive the same, all the property, real and personal, assets, and business of said corporations and limited partnerships; 5. Similar conveyances of property shall be made by the individuals embraced in the second and third classes; 6. The consideration for the transfer and conveyance of the money, property, and business aforesaid to each or any of the Standard Oil Companies shall be stock of the respective Standard Oil Company to which said transfer or conveyance is made, equal at par value to the appraised value of the money, property, and business so transferred. Said stock shall be delivered to the trustees afterwards provided for and their successors, and no stock of any of said companies shall ever be issued except for money, property, or business equal at least to the par value of the stock so issued, nor shall any stock be issued by any of the said companies for any purpose, except to the said trustees to be held subject to the trusts specified; 7. The consideration for any stocks delivered to said trustees shall be the delivery by the trustees to the persons entitled thereto, of trust certificates, equal at par value to the par value of the stocks of the said Standard Oil Companies so received by said trustees and equal to the appraised value of the stocks of other companies or partnerships delivered to the trustees. The remainder of the agreement comprehended minute provisions regarding the mode of election of the trustees, the form of the trust certificates to be issued, and the manner of their issue. The gist of the cause of action stated in the petition was that the stockholders of the defendant company had become parties to the agreement and had transferred all their shares except seven to the trustees, and received from them the trust certificates for the issue of which the agreement provided; that such action of the stockholders was, under the circumstances, to be regarded as the action of the corporation; and that, therefore, the legal effect of such action was to make the corporation itself liable for any consequences

which the laws of the state might attach to such a use of its corporate powers and privileges.

David K. Watson, attorney-general, and John W. Warrington, for the plaintiff.

M. R. Keith, Virgil P. Kline, S. C. T. Dodd, and Joseph H. Choate, for the defendant.

MINSHALL, J. Three questions arise upon the pleadings: 1. Should the defendant, the Standard Oil Company, be regarded as a party in its corporate capacity, to the agreement constituting the Standard Oil Trust; 2. Had the company power to become a party to such an agreement; 3. If so, is the right of the state to demand a forfeiture of its corporate franchises, or of the power to make and perform such agreements, barred by lapse of time.

1. It will be observed, on reading the answer, that while the defendant denies that it "entered into or became a party to either or both of the agreements in said petition set forth," and also "denies that it has at any time or in any manner acquiesced in, or observed, performed, or carried out either or both of said agreements," it does not deny the averment of the petition that "all of the owners and holders of its capital stock, including all the officers and directors of said company, signed said agreements." Nor could it have been the intention to do so, as the answer proceeds to admit, "that it," the corporation, "is informed and beleives that the individuals named in the agreement, being the same individuals who executed" it, "did enter into the agreements set forth" in the petition; claiming "that said agreements were agreements of individuals in their individual capacity, and with reference to their individual property, and were not, nor were they designed to be corporate agreements." The claim is based upon the argument that the corporation is a legal entity separate from its stockholders; that in it are vested all the property and powers of the company, and can only be affected by such acts and agreements as are done or executed on its behalf by its corporate agencies, acting within the legitimate scope of their powers; that its stockholders are not the corporation, that their shares are their individual property, and that they may each and all dispose of, and make such agreements affecting their shares, as best suit their private interests; and that no such acts and agreements of stockholders, subservient of their private interests, can be ascribed to the

company as a separate entity though done and concurred in by each and all of its stockholders.

The general proposition that a corporation is to be regarded as a legal entity, existing separate and apart from the natural persons composing it, is not disputed; but that the statement is a mere fiction, existing only in idea, is well understood, and not controverted by anyone who pretends to accurate knowledge on the subject. It has been introduced for the convenience of the company in making contracts, in acquiring property for corporate purposes, in suing and being sued, and to preserve the limited liability of the stockholders, by distinguishing between the corporate debts and property of the company, and of the stockholders in their capacity as individuals. All fictions of law have been introduced for the purpose of convenience and to subserve the ends of justice. It is in this sense that the maxim, *in fictione juris subsistit æquitas* is used and the doctrine of fictions applied. But when they are urged to an intent and purpose not within the reason and policy of the fiction, they have always been disregarded by the courts: Broom's Legal Maxims, 130. "It is a certain rule," says Lord Mansfield, C. J., "that a fiction of law shall never be contradicted so as to defeat the end for which it was invented, but for every other purpose it may be contradicted": *Johnson v. Smith*, 2 Burr. 962. "They were invented," says Brinkerhoff, J., in *Wood v. Ferguson*, 7 Ohio St. 291, "for the advancement of justice, and will be applied for no other purpose." And it is in this sense that they have been constantly understood and applied in this state: *Hood v. Brown*, 2 Ohio, 269; *Rossman v. McFarland*, 9 Ohio St. 381; *Collard v. Donaldson*, 17 Ohio, 266.

No reason is perceived why the principles applicable to fictions in general should not apply to the fiction that a corporation is a personal entity, separate from the natural persons who compose it, and for whose benefit it has been invented. One author seems to think that it has outlived its usefulness, that it is "a stumbling block in the advance of corporation law towards the discrimination of the real rights of actual men and women," and should be abandoned: Taylor on Corporations, sec. 51. Among the many attempts that have been made to define the nature of a corporation, that given by Mr. Kyd, discarding or at least not adopting, the metaphysical distinction of a legal entity separate from the persons composing it, is certainly the most practical, presenting, as it does, the real

nature of a corporation as seen in its constituents, and in the manner that it is formed and transacts its business. His definition is, "a collection of many individuals united into one body, under a special denomination, having perpetual succession under an artificial form, and vested, by the policy of the law, with the capacity of acting, in several respects, as an individual, particularly of taking and granting property, of contracting obligations, and of suing and being sued, of enjoying privileges and immunities in common, and of exercising a variety of political rights, more or less extensive, according to the design of its institution, or the powers conferred upon it, either at the time of its creation, or at any subsequent period of its existence": 1 Kyd on Corporations, 13. In brief, then, a corporation is a collection of many individuals, united in one body under a special denomination, and vested by the policy of the law with the capacity of acting in several respects as an individual. "The statement," says Mr. Morawetz, "that a corporation is an artificial person, or entity, apart from its members, is merely a description, in figurative language, of a corporation viewed as a collective body; a corporation is really an association of persons, and no judicial *dictum* or legislative enactment can alter this fact": See his work on corporations, section 227. So that the idea that a corporation may be a separate entity, in the sense that it can act independently of the natural persons composing it, or abstain from acting, where it is their will that it shall, has no foundation in reason or authority, is contrary to the fact, and to base an argument upon it, where the question is as to whether a certain act was the act of the corporation, or of its stockholders, cannot be decisive of the question, and is therefore illogical, for it may as likely lead to a false as to a true result.

Now, so long as a proper use is made of the fiction, that a corporation is an entity apart from its shareholders, it is harmless, and, because convenient, should not be called in question; but where it is urged to an end subversive of its policy, or such is the issue, the fiction must be ignored, and the question determined, whether the act in question, though done by shareholders, that is to say, by the persons united in one body, was done simply as individuals, and with respect to their individual interests as shareholders, or was done ostensibly as such, but, as a matter of fact, to control the corporation and affect the transaction of its business, in the

same manner as if the act had been clothed with all the formalities of a corporate act. This must be so, because the stockholders, having a dual capacity, and capable of acting in either, and a possible interest to conceal their character when acting in their corporate capacity, the absence of the formal evidence of the character of the act cannot preclude judicial inquiry on the subject. If it were otherwise, then, in one department of the law fraud would enjoy an immunity awarded to it in no other.

Therefore, the real question we are now to determine, is whether it appears from the face of the pleadings, giving effect to all the denials of fact contained in the answer, that the execution of the agreement set forth in the petition should be imputed to the association of persons constituting the Standard Oil Company of Ohio, acting in their corporate capacity.

The agreement provides, in the first place, that the parties to it shall be divided into three classes, the first class to embrace all the stockholders and members of certain corporations and limited partnerships, the defendant, the Standard Oil Company of Ohio, being one. It is then covenanted by the parties, that, as soon as practicable, a corporation shall be formed in each of certain states, under the laws thereof, Ohio being one, to mine for, produce, manufacture, refine, and deal in petroleum and all its products; with the proviso, however, that instead of organizing a new corporation, any existing one "may be used for the purpose when it can advantageously be done," and in Ohio the defendant has been so used.

In a subsequent part of the agreement, nine trustees are selected, their powers and duties are defined, and provision made for the selection of their successors.

As will hereafter appear, it is made the duty of the parties to the agreement to transfer their stocks or interests in their respective companies or firms to these trustees, who hold the same in trust, but with the power to vote on the same as though the real owners; in consideration of which, trust certificates are issued to the owners, who, as the owners of such certificates, elect the successors of the trustees.

It is then provided that all the property, assets, and business of the corporations and limited partnerships embraced in the first class "shall be transferred to and vested in the said several Standard Oil Companies." And in order to ac-

comply with this purpose, it is provided that, "the directors and managers of each and all of the several corporations and limited partnerships mentioned in class first, are hereby authorized and directed by the stockholders and members thereof (all of them being parties to this agreement) to sell, assign, transfer, convey, and make over, for the consideration hereinafter mentioned, to the Standard Oil Company or companies, of the proper state or states, as soon as said corporations are organized and ready to receive the same, all the property, real and personal, assets, and business of said corporations and limited partnerships."

Now, in the case of the defendant, it will be observed that this contemplated, and could not have been accomplished, without corporate action. The Standard Oil Company of Ohio was required to transfer all its property, assets, and business to a new company to be organized in the state; and this was to be accomplished by the obligation imposed on its members and stockholders, all of whom are parties to the agreement, to authorize and require the directors and managers to make the transfer. The property and assets of the corporation could only be transferred by a corporate act, and the agreement could not, in this respect, be carried into effect other than by such corporate act; and clearly indicates that the purpose of the stockholders of the defendant, in becoming a party to it, was to affect their property and business as a corporation; in other words, was to act in their corporate, and not in their individual capacity.

The subsequent agreement of January 4, 1882, does not materially change the original agreement in this regard: Reciting that "it is not deemed expedient that all of the companies and associations should transfer their property to the said Standard Oil Companies at the present time," and "that it is deemed advisable that a discretionary power should be vested in the trustees as to when such transfer should be made, provides that, "until said trustees should so decide, each of said companies shall remain in existence and retain its property and business, and the trustees shall hold the stock thereof, in trust as in said agreement provided." So that under the agreement as modified the directors and managers of the defendant may be required by its stockholders and members, all of whom are parties to the agreement, to make the transfer of the property and business of the defendant, whenever the trustees may in their discretion direct. The

effectiveness of this provision to secure all intended by it, may be better understood, by observing that "the directors and managers," "the stockholders and members" and "the trustees" here mentioned, are substantially the same persons, occupying these different relations at one and the same time.

It signifies nothing that the transfer here provided for has not, as respects the defendant, been made. It does not change the evidence it affords of the purpose and object of the members of the corporation in becoming parties to the agreement.

Again, the agreement, as performed by the members of the defendant, as effectually places the property and business of the defendant under the control and management of the Standard Oil Trust, as if the same had been transferred as provided in the original agreement. It is averred in the petition, and not denied in the answer, "that prior to the dates of the trust agreements aforesaid, defendant's capital stock consisted of thirty-five thousand shares of one hundred dollars each, and upon the signing of said agreements in the manner aforesaid, thirty-four thousand nine hundred ninety-three shares of said stock, belonging to the persons who signed the agreements in manner above set forth (in what proportions, however, plaintiff is unable to state), were transferred, by defendant's transferring officers, upon defendant's stock books, to the certain nine trustees who were appointed and named in the first one of said trust agreements, upon the request of the respective owners of said shares and in pursuance of the provisions of said trust agreements, the remaining seven of said shares of stock being retained by, or transferred to, the directors of defendant company; that at the time said transfer of stock was made, there were seven directors of defendant, and each one of the seven held one share of the stock aforesaid, but the number of said directors was thereafter reduced to five, who still hold and vote said seven shares of stock and no more. That in lieu of the transfer of said thirty-four thousand nine hundred ninety-three shares, as aforesaid, to the nine trustees above mentioned, an equal amount, in par value, of certificates of the Standard Oil Trust, which were provided for and described in said trust agreements, was issued and delivered by said nine trustees to the persons aforesaid, from whom said nine trustees had received said thirty-four thousand nine hundred ninety-three shares of stock in defendant company; that the capital stock of said defendant company is still three million five hundred thousand dol-

lars, and the nine trustees before mentioned still hold and control the thirty-four thousand nine hundred ninety-three shares thereof which were transferred to them as above stated."

So that all but seven of the thirty-five thousand shares of the defendant's capital stock has been transferred by the owners, who are parties to the agreement, to the trustees of the Standard Oil Trust; and continue to be held in trust, as appears by the supplemental agreement, the transferrers receiving in lieu thereof trust certificates equal at par value to the par value of the stock received. The control which this gives, and was intended to give, over the business of the defendant, appears from the following provision contained in the trust agreement:—

"It shall be the duty of said trustees to exercise general supervision over the affairs of said several Standard Oil Companies, and as far as practicable over the other companies or partnerships, any portion of whose stock is held in said trust. It shall be their duty as stockholders of said companies to elect as directors and officers thereof faithful and competent men. They may elect themselves to such positions when they see fit so to do, and shall endeavor to have the affairs of said companies managed and directed in the manner they may deem most conducive to the best interests of the holders of said trust certificates."

Thus, the trustees, as the legal owners of the stock, may not only elect who they please, but may elect themselves, as directors of the defendant; and not only may manage, but it is their duty to have "the affairs" of the defendant, managed and directed in the manner they may deem most conducive to the best interests of the holders of the trust certificates. In other words, it is to be managed in the interest of the Standard Oil Trust, whose principal place of business is in New York City, irrespective of what might be its duties to the people of this state, from which it derives its corporate life; and its real stockholders receive their dividends from the profits of that trust, and not from the earnings of their company; for the holders of the trust certificates, received in exchange for their stock transferred to the trustees, remain in law and equity, the real owners of the stock so transferred; and the averment in the answer that the dividends of the company are paid to the holders of its stock, "appearing as such on its stock books," is immaterial; since these persons are not the owners, but the trustees of the stock. In fact, the

averment is simply a part of the evidence, that the company, through its directors, recognizes and performs the agreement on its part. The payment of its dividends to the persons appearing as stockholders on its stock books, is what enables the parties to the agreement to realize the primary object of the trust agreement—the accumulation of the earnings of the various companies, partnerships, and individuals named in the agreement, as a common fund from which the holders of the trust certificates are to be paid dividends when declared by the trustees; and whereby many separate interests being united under one management, form a virtual monopoly through the power acquired of so controlling the production and price of petroleum and its products, as to destroy competition.

Applying then the principle that a corporation is simply an association of natural persons, united in one body under a special denomination, and vested by the policy of the law with the capacity of acting in several respects as an individual, and disregarding the mere fiction of a separate legal entity, since to regard it in an inquiry like the one before us would be subversive of the purpose for which it was invented, is there, upon an analysis of the agreement, room for doubt, that the act of all the stockholders, officers, and directors of the company in signing it, should be imputed to them as an act done in their capacity as a corporation? We think not, since thereby all the property and business of the company is, and was intended to be, virtually transferred to the Standard Oil Trust, and is controlled, through its trustees, as effectually as if a formal transfer had been made by the directors of the company. On a question of this kind, the fact must constantly be kept in view, that the metaphysical entity has no thought or will of its own; that every act ascribed to it, emanates from and is the act of the individuals personated by it; and that it can no more do an act, or refrain from doing it, contrary to the will of these natural persons, than a house could be said to act independently of the will of its owner; and, where an act is ascribed to it, it must be understood to be the act of the persons associated as a corporation, and whether done in their capacity as corporators or as individuals, must be determined by the nature and tendency of the act.

It therefore follows, as we think, from the discussion we have given the subject, that where all, or a majority of the

stockholders comprising a corporation, do an act which is designed to affect the property and business of the company, and which, through the control their numbers give them over the selection and conduct of the corporate agencies, does affect the property and business of the company, in the same manner as if it had been a formal resolution of its board of directors; and the act so done is *ultra vires* of the corporation and against public policy, and was done by them in their individual capacity for the purpose of concealing their real purpose and object, the act should be regarded as the act of the corporation; and, to prevent the abuse of corporate power may be challenged as such by the state in a proceeding in *quo warranto*.

2. That the nature of the agreement is such as to preclude the defendant from becoming a party to it, is, we think, too clear to require much consideration by us. In the first place, whether the agreement should be regarded as amounting to a partnership between the several companies, limited partnerships, and individuals, who are parties to it, it is clear that its observance must subject the defendant to a control inconsistent with its character as a corporation. Under the agreement, all but seven of the shares of the capital stock of the company have been transferred by the real owners to the trustees of the trust, who hold them in trust for such owners; and being enjoined by the terms of the agreement to endeavor to have "the affairs" of the several companies managed in a manner most conducive to the interest of the holders of the trust certificates issued by the trust, have the right, in virtue of their apparent legal ownership, and by the terms of the agreement, to select such directors of the company as they may see fit; nay more, may in fact select themselves. The law requires that a corporation should be controlled and managed by its directors in the interest of its own stockholders, and conformable to the purpose for which it was created by the laws of its state. By this agreement, indirectly it is true, but none the less effectually, the defendant is controlled and managed by the Standard Oil Trust, an association with its principal place of business in New York City, and organized for a purpose contrary to the policy of our laws. Its object was to establish a virtual monopoly of the business of producing petroleum, and of manufacturing, refining, and dealing in it and all its products throughout the entire country, and by which it might not merely control the production, but

the price at its pleasure. All such associations are contrary to the policy of our state, and void: *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666; *Emery v. Ohio Candle Co.*, 47 Ohio St. 320; 21 Am. St. Rep. 819. "The word 'trust,'" says Mr. Cook, "was first used to mean an agreement, between many stockholders in many corporations, to place all their stock in the hands of trustees, and to receive therefor trust certificates from the trustees. The stockholders thereby consolidated their interests, and became trust certificate holders. The trustees own the stock, vote it, elect the officers of the various corporations, control the business, receive all the dividends on the stock, and use all these dividends to pay dividends on the trust certificates. The trustees are periodically elected by the trust certificate holders. The purpose of the 'trust' is to control prices, prevent competition, and cheapen the cost of production. The Standard Oil Trust, the American Cotton Seed Oil Trust, and the Sugar Trust are examples of this method of combination": Cook on Stock and Stockholders, sec. 503 a. See also Wait on Insolvent Corporations, sec. 478.

Much has been said in favor of the objects of the Standard Oil Trust, and what it has accomplished. It may be true that it has improved the quality and cheapened the costs of petroleum and its products to the consumer. But such is not one of the usual or general results of a monopoly; and it is the policy of the law to regard, not what may, but what usually, happens. Experience shows that it is not wise to trust human cupidity where it has the opportunity to aggrandize itself at the expense of others. The claim of having cheapened the price to the consumer is the usual pretext on which monopolies of this kind are defended; and is well answered in *Richardson v. Buhl*, 77 Mich. 632. After commenting on the tendency of the combination, known as the Diamond Match Company, to prevent fair competition and to control prices, Champlin, J., said: "It is no answer to say that this monopoly has in fact reduced the price of friction matches; that policy may have been necessary to crush competition. The fact exists that it rests in the discretion of this company at any time to raise the price to an exorbitant degree."

Monopolies have always been regarded as contrary to the spirit and policy of the common law. The objections are stated in "The Case on Monopolies," *Darcy v. Allein*, Coke, part 11, 84 b. They are these: 1. "That the price of the same

commodity will be raised, for he who has the sole selling of any commodity may well make the price as he pleases"; 2. "The incident to a monopoly is, that after the monopoly is granted, the commodity is not so good and merchantable as it was before; for the patentee, having the sole trade, regards only his private benefit, and not the commonwealth"; 3. "It tends to the impoverishment of divers artificers and others, who before, by the labor of their hands in their art or trade, had maintained themselves and their families, who will now of necessity be constrained to live in idleness and beggary." The third objection, though frequently overlooked, is none the less important. A society in which a few men are the employers and the great body are merely employees or servants is not the most desirable in a republic; and it should be as much the policy of the laws to multiply the numbers engaged in independent pursuits or in the profits of production as to cheapen the price to the consumer. Such policy would tend to an equality of fortunes among its citizens, thought to be so desirable in a republic, and lessen the amount of pauperism and crime. It is true that in the case just cited the monopoly had been created by letters patent; but the objections lie not to the manner in which the monopoly is created. The effect on industrial liberty and the price of commodities will be the same whether created by patent or by an extensive combination among those engaged in similar industries controlled by one management. By the invariable laws of human nature, competition will be excluded and prices controlled in the interest of those connected with the combination or trust.

3. The defendant relies upon a provision in section 6789, Revised Statutes, as a bar to the action. That provision is as follows: —

"Nothing in this chapter contained shall authorize an action against a corporation for forfeiture of charter, unless the same be commenced within five years after the act complained of was done or committed."

It is contended, however, by counsel for the plaintiff, that this section does not apply to a proceeding instituted on behalf of the state by the attorney-general to forfeit the charter of a corporation; that it was only intended to apply to like proceedings by prosecuting attorneys. The argument is based upon what is claimed to have been the law prior to the revision, and that there could have been no intention to change it

in this regard by the above provision. We cannot adopt this conclusion. It is contained in the very chapter under which the proceeding was commenced by the attorney-general. It contains no exception, and we are not warranted in making one against the plain language of the statute.

It is further contended that the provision does not apply by reason of the fact, as averred in the petition, "that the plaintiff had no knowledge of the existence of either of the aforesaid agreements, or of the acts hereinbefore recited, until the latter part of the year 1889." The general rule is that a party's want of knowledge does not prevent the running of the statute of limitations against an action that has accrued in his favor; and the only exception is concealment or fraud on the part of the defendant, which is expressly confined by our statute to "an action for relief on the ground of fraud": Rev. Stats., sec. 4982. This is not such an action, and fraud in fact is not averred; it is simply want of knowledge on the part of the plaintiff.

But the whole of section 6789, Revised Statutes, is not quoted by the defendant; it further proceeds: "Nor shall an action be brought against a corporation for the exercise of a power or franchise under its charter which it has used and exercised for a term of twenty years." Therefore, within that time, such a proceeding may be brought. The defendant, as we have shown, in making and entering into the trust agreements, exercised a power for which it had no authority under the laws of this state, and is continuing to perform the agreement on its part. In addition to a prayer for the forfeiture of the defendant's right to be a corporation, the state prays for such other relief as to the court may seem just and proper; and, in the opinion of the court, the defendant should be ousted from the power to make and perform the agreement set forth in the petition, or any part of it.

And in this connection, it is proper to say that in the judgment of the court, if the company, through its directors or otherwise, should hereafter recognize the transfers of the shares that have been made on its stock books to the trustees provided for in the trust agreement, or should hereafter make such transfers, or should pay dividends to them instead of to the real owners of the shares, or should permit such trustees to vote on shares so held by them in the election of its directors, in every such case, it must be regarded and held as per-

forming the agreement in violation of the judgment of this court.

Judgment ousting the defendant from the right to make the agreement set forth in the petition and of the power to perform the same.

CORPORATIONS — HOW FAR CONSIDERED DISTINCT ENTITIES FROM MEMBERS. — A corporation is a legal entity, separate and distinct from the individuals, who from time to time may be its stockholders: *Moore etc. Hardware Co. v. Towers Hardware Co.*, 87 Ala. 206; 13 Am. St. Rep. 23; *Fretson v. Hay*, 122 Ill. 298; 3 Am. St. Rep. 492; *Pierce v. New Orleans Building Co.*, 9 La. 397; 29 Am. Dec. 448.

CORPORATIONS — MONOPOLIES. — Whatever tends to create a monopoly and to prevent competition between those engaged in a business impressed with a public character is opposed to public policy and void: *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 17 Am. St. Rep. 319, and note; *Texas etc. Oil Co. v. Adoue*, 83 Tex. 650; 29 Am. St. Rep. 690, and note; *Emery v. Ohio Candle Co.*, 47 Ohio St. 320; 21 Am. St. Rep. 819, and note. An agreement by which several transportation companies combine for the purpose of destroying competition and establishing uniform rates of freight is injurious to trade and commerce: *Hooker v. Vandewater*, 4 Denio, 349; 47 Am. Dec. 258.

LIMITATIONS OF ACTIONS — IGNORANCE. — The time of limitation of an action is not prolonged by want of knowledge that an action in his favor has accrued: *Latta v. Gillette*, 95 Cal. 317; 29 Am. St. Rep. 115, and note; *Houston etc. R'y Co. v. Adams*, 49 Tex. 748; 30 Am. Rep. 116; *Smith v. Bishop*, 9 Vt. 110; 31 Am. Dec. 607, and note; *Jordon v. Jordon*, 4 Greenl. 175; 16 Am. Dec. 249; *Thomas v. White*, 3 Litt. 177; 14 Am. Dec. 56. The statute of limitations does not run against an action to recover for unjust discrimination by a carrier until such discrimination is discovered when it is fraudulently concealed by the carrier: *Cook v. Chicago etc. R'y Co.*, 81 Iowa, 551; 25 Am. St. Rep. 512. See note to *Lataillade v. Orena*, 25 Am. St. Rep. 226. Fraudulent concealment to stop the running of the statute of limitations, see notes to *Snodgrass v. Branch Bank*, 60 Am. Dec. 511, and *Ferris v. Henderson*, 51 Am. Dec. 583.

LESTER v. BUEL.

[49 OHIO STATE, 240.]

CONTRACTS FOR THE SALE OF GOODS TO BE DELIVERED IN THE FUTURE, WHEN ILLEGAL. — A contract by which a person agrees to buy or sell, for future delivery, a commodity which he does not own at the time the contract is made, and which must be obtained by purchase in the open market when the time for delivery arrives, is valid only when the parties really intend that the commodity is to be delivered and the price paid. If it is the understanding of the parties, whether expressed or not, that the commodity is not to be delivered, but that one party is to pay to the other the difference between the contract and the market prices at the date fixed for executing the contract, then the whole transaction constitutes nothing more than a wager, and is null and void.

WAGERS — RIGHT OF THE LOSER TO RECOVER MONEY PAID TO THE WINNER. — If the evidence shows that an agreement for the future delivery of commodities is a wagering contract, to be performed by the adjustment of the difference between the market and the contract price at the date fixed for its execution, the mere fact that one of the parties has professed to act in the character of a broker will not render him the less liable to the penalties of the law, nor constitute a defense to an action in which the other party seeks, under the provisions of a statute giving the loser of a wager the right to recover the money transferred to the winner, to recover the sum paid by him for the purpose of making that adjustment.

ACTION upon an account. The plaintiff in his petition averred that, at the times stated therein, the plaintiff had purchased and sold for the defendants certain lots of grain at the prices specified, and that, according to the agreement, he was to be paid on such purchases and sales the commissions set forth in the account. Judgment was asked for one thousand thirty-seven dollars and fifty cents. In their answer the defendants alleged that the transactions referred to in the account were really wagering contracts; that the understanding of the parties was that no purchases or sales of grain were really to be effected, and that none were ever made, but that the parties settled the losses incurred on either side according to the rise or fall of the prices in the Chicago grain market. Furthermore, by way of counterclaim, it was averred by the defendants that they had at various times paid to the plaintiff, for the settlement of their losses, sums of money aggregating three thousand eight hundred eighty-seven dollars and fifty cents, and asked judgment against the plaintiff for that amount, on the ground that the winner of a wager was, by statute, liable to be compelled to refund any money which the loser might have paid to him.

White, Johnson and McCaslin, for the plaintiff in error.

George A. Groot, for the defendant in error.

MINSHALL, J. Two questions arise upon this record: The first relates to the right of the plaintiff to recover upon his petition; and the second relates to the right of the defendants to recover upon their counterclaim, although the plaintiff may have no right to recover upon his petition; in other words, whether the purchases and sales of grain on which the plaintiff has charged and seeks to recover commissions, were wagers upon the future price of the commodities bought and sold; and, if so, whether, under the statutes of this state, the

defendants may recover from him the amount claimed, as the "winner" of the money so "lost" and paid to him.

Though all the evidence is set forth in a bill of exceptions, it is not the province of this court to consider it for the purpose of determining whether the finding of the jury is right as a matter of fact. If the evidence was submitted to the jury under proper instructions, we must accept its finding as an affirmation of the claim of the defendants, as to the character of the alleged purchases and sales of grain, on which the plaintiff seeks to recover the commissions charged in the account on which he has brought his suit.

It is well settled that purchases or sales of commodities of any kind for future delivery are valid, although the seller may not own the commodity at the time the contract is made, and will have no other means of performing than by going into the market and making the requisite purchase when the time for delivery arrives; "but such a contract is only valid when the parties really intend and agree that the goods are to be delivered by the seller and the price to be paid by the buyer; and, if under the guise of such a contract, the real intent be merely to speculate in the rise or fall of prices, and the goods are not to be delivered, but one party is to pay to the other the difference between the contract price and the market price of the goods at the date fixed for executing the contract, then the whole transaction constitutes nothing more than a wager, and is null and void: Benjamin on Sales, sec. 542.

This is so well settled that we think it unnecessary to do more than refer to a few of the leading cases on the subject: *Irwin v. Williar*, 110 U. S. 499, 508, 510; *Embrey v. Jemison*, 131 U. S. 336, 344; *Bigelow v. Benedict*, 70 N. Y. 202, 206; 26 Am. Rep. 573; *Kahn v. Walton*, 46 Ohio St. 195, 215.

In this state, by an act adopted April 25, 1882, and embodied in section 6934 a, Revised Statutes, such contracts are declared to be "gambling contracts," and the parties making them liable to fine and imprisonment. Its language, applicable to this case, is, "Whoever contracts to have or give to himself or another the option to sell or buy, at a future time, any grain, or other commodity, . . . where the intent of the parties thereto is that there shall not be a delivery of the commodity sold, but only a payment of differences by the parties losing upon the rise or fall of the market," shall be fined and imprisoned; and the contracts so made, "shall be

considered gambling contracts, and shall be void." So that in this state the character of such contracts rests not merely upon judicial decision, but also upon statute; and there is no room for question as to what the law is in such cases. Many of the other states have similar statutes. And, indeed, Mr. Bishop says: "By common consent, all bargains for the purchase and sale of things — for example, stocks and commodities — where it is the understanding of the parties, whether expressed or not, that the things are not to be delivered, but at the agreed time the 'differences' between their market values at the two periods are to be adjusted, and all other transactions of this nature, are illegal or against public policy, to the extent that the courts will not enforce them." These are all gambling contracts, disturbing the course of trade, and not tolerated by the law. "But," he adds, "a sale, in good faith, for future, actual delivery, is valid, even though, at the time of the sale, the seller has not the article in possession": Bishop on Contracts, sec. 534 and notes.

And the law is the same where the suit is by one who acted as broker to recover commissions for making the purchases or sales, where he had knowledge of the character of the transaction; for in such case he is a *particeps criminis*, and has no better right to recover than either of the other parties to the wager: *Embrey v. Jemison*, 131 U. S. 336; *Kahn v. Walton*, 46 Ohio St. 195; *Pearce v. Foote*, 118 Ill. 228; 55 Am. Rep. 414.

The evidence in the case tended to show that the transactions between the parties were simply wagers upon the course of the grain market at Chicago, although the plaintiff and his witnesses testified that the purchases and sales were real, and that deliveries would have been made if required by the customer. The defendants testified that there was no such understanding, and that the transactions were simply wagers; and looking at the circumstances as detailed in evidence, we are unable to see how either party could have had any other understanding. The account attached to the petition shows that in the brief period of about two months five hundred thirty-five thousand bushels of grain were bought, and that exactly the same number was sold, without a single delivery having been made. The customer was required to deposit a certain amount in the way of "margins," and which he was to keep good by adding thereto, when, in the course of the

transactions, he met with losses. There were, it seems, twenty-three different, but continuous, deals. When a certain number of bushels of corn or wheat was bought for future delivery, on the next, or a few days thereafter, a like number was sold. If the sale was at a price higher than the purchase, commissions were deducted, and the remainder, if any, went to the credit of the customer's account; if for less than the purchase, the commissions were added to the difference, and the sum went to his debit; or if the first transaction was a sale, it would be closed by a purchase of a like number of bushels. And here, if the purchase was upon a rising market, the customer lost; if upon a declining market, he gained. and his account was in each case debited or credited accordingly. Now, when it is remembered that neither of the defendants had any actual connection with the grain business, — had no need to buy or sell grain of any kind, — the one being a young physician and the other an assistant in the office of the city treasury, and without the means, as the plaintiff knew, of purchasing such large quantities of grain, and as no grain was in fact delivered, each transaction being settled according to the difference in the market between the time of purchasing and the time of selling, or conversely, between the time of selling and the time of purchasing, what inference should be drawn from such a state of facts other than that reached by the jury?

The court charged the jury that, "a contract for the sale of grain or other commodity, to be delivered at a future day, is not invalidated by the fact that it was to be delivered at a future day, or by the additional fact that at the time of the making of the contract the vendor had not the goods in his possession, or by the additional fact that at the time he had not entered into any contract to buy or procure the goods, nor by the further fact that at the time he had no reasonable prospect of procuring them for delivery, according to the tenor of the contract. In such case, if either party to the contract has the right to compel a delivery or receipt of the goods, it is a valid contract, although the parties thereto thereafter settle, and agree to close up the transactions by a payment of differences. Nor does the statute of Ohio, which has been read and commented upon in your hearing, apply to sales of grain or other goods for future delivery, where the only option is as to the time of delivery within certain limits." And then charged that, "An understanding between

the vendor and vendee at the time the contract is made, that the goods shall not be delivered or received, but merely to pay or receive the difference between the price agreed upon and the market price at the time agreed upon for its delivery, brings the transaction within the statute, and is void; nor does it matter what form the parties give to their contracts," . . . "no amount of painstaking or legal exactness," they were told, could change the result, if the intention of the parties appeared to have been to deal in future options simply.

The case was in this regard fairly submitted to the jury; and, we may add, that, if it was proper for us to weigh the evidence, we would not feel at all disposed to disturb the verdict. It matters little what devices may be used, or what phraseology may be adopted for the purpose of giving to a transaction a fair mercantile appearance, if a court and jury are satisfied from all the circumstances in evidence, that it is simply a wager in disguise, there is no rule of law nor principle of reason, that can require them to disregard their convictions upon the subject. Persuasions so obtained are no more than the result of the aggregate proof of the evidence, by which, in every case, the verdict of the jury should be rendered; and no amount of what they may honestly believe to be perjury, can require them to disregard conclusions forced upon their minds by all the evidence in the case.

The next question is, had the defendants the right on their counterclaim to recover back the sums paid the plaintiff in the way of margins. This the court charged they had the right to do, "less the amount they received by the way of profits," if the jury found under the instructions before given them, that the "contracts were gambling transactions," and were known at the time to be such by the plaintiff.

The plaintiff makes two objections to the right of the defendants to recover: 1. That he simply acted as agent of the defendants in making the purchases and sales, and that the money received by him was paid to the persons with whom he dealt on behalf of the defendants; and that he is, therefore, not the "winner," the statute, section 4270, Revised Statutes, simply providing for a recovery against the "winner" by the loser on any bet or wager; 2. That he paid the money over according to the understanding before notice or suit brought.

If these purchases and sales of grain were in fact wagers

on the future price of the grain ostensibly dealt in, then it is clear that the relation of principal and agent did not exist between the defendants and the plaintiff; and, that they were such, was found by the verdict of the jury under proper instructions from the court.

The parties to a wager stand in opposed relations, each acting for himself in the matter of making it. Both may be *particeps criminis* with respect to the crime, in other words principals in its commission, but neither acts for the other. And this is so in many offenses against public policy, as in usury and the like.

It is not doubted but that in a sense either party to a wager may have an agent—that is, either may act for himself through another. As in this case, the defendants at first acted through Hale, who, by their direction, put up the margins for them; and so the plaintiff may have acted for or with other parties in Chicago. But under the finding of the jury, that the transactions between the parties were wagers, neither could have acted for the other. The assumption of the plaintiff that he was buying or selling wheat for the defendants, was a mere disguise adopted for the purpose of concealing the nature of the real transaction; and, as it had no foundation in fact, the agency based upon it is alike a mere assumption and had no real existence. The transactions were had directly with the plaintiff through his agent, Collins, at Cleveland. The money was received of the defendants by Collins and transmitted to him at Chicago. If he saw fit to divide with others associated with him in making the wager, that was a matter of his own concern, but it cannot alter the case, nor affect the right of the defendants to recover from him as a “winner” under the statute.

The cases cited and relied on by counsel for the plaintiff in error, are without application here, for the reason that they are all cases where there was no question about the agency of the party from whom a recovery was sought: *Smith v. Bromley*, Doug. 696, note; *Bone v. Ekless*, 5 Hurl & N. 925, 928; Wharton on Agency, sec. 250. They establish the well-settled principle, that where money is delivered to an agent to be applied to an illegal purpose, whilst the agent has no right to retain it, yet where he has paid it over in accordance with the instructions to him, before notice from the principal not to do so, no recovery can be had against him. For example, if suit had been brought by Buel and Watkins to

recover of Hale the money placed in his hands to be put up as margins with Lester, Hale, by way of defense, might have shown that he had placed the money as instructed before notice to him not to do so. But Lester can make no such defense, the character of agent having been simply assumed, to conceal the real nature of the relation between himself and the defendants, and to disguise what was known to be a crime. The relation was an assumed, and not a real one; and is, therefore, no defense to the action given the loser by statute to recover of the winner money lost on a wager.

The provisions of section 4270 are not directed against any particular form of gambling. The language is, "If any person, by playing at any game, or by means of any bet or wager, loses to any other person any sum of money or other thing of value, and pays or delivers the same, or any part thereof, to the winner," the person who so loses and pays may within the time named recover the same "from the winner thereof." The evil is the same whether the money is wagered upon the turn of a card, the result of a horse race, or the course of the market; and the language is broad enough to include not only either of these forms of betting, but any form in which money is lost and paid to the "winner" upon a bet or wager. A wager is generally defined by lexicographers as something hazarded upon an uncertain event; and this agrees with its legal acceptance. As defined by Anson, "A wager is a promise to pay money, or transfer property upon the determination or ascertainment of an uncertain event": Anson on Contracts, 166. With regard to the future, the market is always a matter of uncertainty and speculation. When left to its natural course it will fluctuate from day to day, but still more so when manipulated by gamblers, who under the disguise of buying and selling, simply lay wagers upon its future course. Such transactions the legislature has, in section 6934a of the Revised Statutes, declared to be gambling, and this section should be construed with section 4270 of the Revised Statutes, so as to suppress gambling upon the future price of grain and other commodities, as upon any other uncertain event, not merely because of its evil influence upon public morals, but because of its ruinous effect upon legitimate trade and commerce. In *Pearce v. Foote*, 113 Ill. 228, 239, 55 Am. Rep. 414, Scott, J., in construing similar statutes of the state of Illinois, said: "Although the statutes being considered are highly penal, there is no warrant for construing them with

any unreasonable strictness. They ought rather to have a just, if not liberal, construction, to the end the legislative intention may be accomplished, — to prohibit all dealings in options in grains or other commodities. Nothing is productive of more mischievous results. Considerable fortunes secured by a life of honest industry have been lost in a single venture in 'options.' The evil is all the more dangerous from the fact it seemingly has the sanction of honorable commercial usage in its support. It is a vice that has in recent years grown to enormous proportions. Legitimate transactions on the board of trade are of the utmost importance in commerce. Such contracts whether for immediate or future delivery, are valid in law, and receive its sanction and all the support that can be given to them. It is only against unlawful 'gambling contracts' the penalties of the law are denounced, and no subtle finesse of construction ought to be adopted to defeat the end it is to be hoped may be ultimately accomplished."

It may well be doubted, whether it required the legislative declaration contained in section 6934a of the Revised Statutes, that contracts for such options as are made punishable by it, should be construed to be "gambling contracts," to bring them within the remedy given the loser against the winner by section 4270 of the Revised Statutes; for being wagers upon an uncertain event, they would come within the letter and spirit of that section, without such legislative provision; and to so hold, is not to give to the statute a liberal but a strict construction.

We see no error in the charge of the court. It was liberal to the plaintiff, and in some respects, more so than was required by the law and facts of the case.

Judgment affirmed.

CONTRACTS FOR THE SALE OF GOODS TO BE DELIVERED IN FUTURE — WHEN ILLEGAL. — Contracts for the future delivery of stocks or produce, in which it is contemplated that the commodity shall not be delivered, is contrary to public policy and will not be enforced: *Oliphant v. Markham*, 79 Tex. 543; 23 Am. St. Rep. 363, and note; *Snoddy v. Bank*, 88 Tenn. 573; 17 Am. St. Rep. 918; *Floyd v. Patterson*, 72 Tex. 202; 13 Am. St. Rep. 787; *Sondheim v. Gilbert*, 117 Ind. 71; 10 Am. St. Rep. 23, and extended note; *Crawford v. Spencer*, 92 Mo. 498; 1 Am. St. Rep. 745, and extended note; *Watte v. Wickersham*, 27 Neb. 457; *Mohr v. Miesen*, 47 Minn. 228; *Perryman v. Wolfe*, 93 Ala. 290.

WAGERS — RIGHT OF LOSER TO RECOVER MONEY PAID WINNER. — Under the Kentucky statute money lost in gambling in futures can be recov-

ered by the loser: *Lyons v. Hodgen*, 90 Ky. 280; and so in Illinois: *Pearce v. Foot*, 113 Ill. 228; 55 Am. Rep. 414. *Contra*: *Lawton v. Blitch*, 83 Ga. 662. Money put in the hands of an agent to purchase futures can be recovered when no part of such money consists of profits made by the agent for the principal out of the illegal venture: *Clarke v. Brown*, 77 Ga. 606; 4 Am. St. Rep. 98. See extended note to *Crawford v. Spencer*, 1 Am. St. Rep. 760. Generally money lost at gaming cannot be recovered back where it has been delivered to the winner: *Allen v. Dodd*, 4 Humph. 131; 40 Am. Dec. 632, and note; *Hockaday v. Willis*, 1 Spear, 379; 40 Am. Dec. 606; *Downs v. Quarles*, Litt. Sel. Cas. 489; 12 Am. Dec. 337, and extended note; unless made recoverable by statute: *Stacy v. Foss*, 19 Me. 335; 36 Am. Dec. 755, and note; *Allen v. Dodd*, 4 Humph. 131; 40 Am. Dec. 632.

COLEMAN v. INSURANCE COMPANY.

[49 OHIO STATE, 310.]

FORFEITURES DO NOT READILY FIND FAVOR IN THE LAW, and courts are reluctant to declare and enforce them if, by reasonable interpretation, it can be avoided.

CONTRACTS ABOUT SEVERAL THINGS FOR A SINGLE CONSIDERATION, WHEN ENTIRE. — The principle by which the courts are governed when they declare that a contract about several things, but with a single consideration in gross, is entire and not severable, is that it is impossible to affirm that the party making the contract would have consented to do so unless he had supposed that the rights to be acquired thereunder would extend to all the things in question.

INSURANCE CONTRACT, WHEN SEVERABLE. — A contract of insurance of two or more kinds of property, which are specifically appraised and valued in the policy, will be deemed severable and not entire, unless there is something in the terms or nature of the particular contract, or in the circumstances of the case, or in the nature of the different subjects of insurance, from which it may be inferred that the insurer would not have been likely to have assumed the risk on one of several of them, unless induced by the advantage and profit of having a risk on all. Hence, though there may have been some conduct of the insured as to some of the property not evil in itself, but working a breach of a condition in its letter, — as, for example, an innocent and unintentional concealment regarding the title by which the insured holds his land, — the effect of that breach may be confined to the insurance upon that property, and the contract as to that held void, and as to the other subjects held valid.

ACTION upon a fire insurance policy issued to the plaintiffs by the defendant company, and containing the following clauses: "Two hundred dollars on their one-story frame shingle-roof storehouse; three thousand eight hundred dollars on the general stock of merchandise, consisting principally of dry goods, groceries, clothing, boots and shoes, hats and caps, queensware, glassware, cutlery, and such other articles as are usually kept for sale in a country store, all contained

in their one-story shingle-roof storehouse, situated in Pike County, Kentucky." There was a total loss, for which the defendants refused to pay on the ground that there had been a breach of a condition in the policy by which it was to be void "if any building intended to be insured stood on ground not owned in fee simple by the assured." The trial judge instructed the jury that the contract was entire, and that if they found that the insured were not the owners in fee simple of the land, they could not recover. The jury rendered a verdict for the defendant, and the plaintiff asked for a reversal of the judgment entered in accordance therewith, on the ground that the above charge was erroneous.

Harper, Searls and Millner, and George O. Newman, for the plaintiffs in error.

Wells A. Hutchins, Sylvester G. Williams, and Eugene Wambaugh, for the defendant in error.

WILLIAMS, J. The policy of insurance contains the provisions that, "if the assured is not the sole and unconditional owner of the property, or if any building intended to be insured stands on ground not owned in fee simple by the assured," the policy "shall become void, unless consent in writing, by the company, be indorsed thereon." The policy was issued without any written application signed by the assured, and the insurance was solicited, as the evidence shows, at the request of the company's agent, by a third person, on whose report the agent made up the application on which the policy was issued. The assured made no statement, nor was any requested, in regard to the ownership or title of the ground on which the house referred to in the policy stood; and it does not appear that there was any intentional concealment of the title, or of any fact material to the risk. It was shown by the evidence that the fee simple of the land on which the insured building stood, was vested in Hammond Coleman, a member of the firm of H. Coleman & Co., and his wife, who was not a member of the firm; but that several years previous to the date of the policy, Hammond Coleman executed a deed for the land directly to his wife, without the intervention of a trustee, in which the following provision is contained: "This deed is not to take effect until my death. This deed is in compliance with my will heretofore made." The copartnership of H. Coleman & Co., when the insurance was effected, and at the time of the fire, consisted of Hammond Coleman,

Adam Venters, and Henry E. Coleman; and the actual value of the stock of goods and merchandise covered by the policy exceeded the valuation therein set forth.

The court instructed the jury that their inquiry in regard to the title to the land on which the storehouse stood must be: "Did the plaintiffs,—not Hammond Coleman,—have such (fee simple) estate in this land upon which the building stood? It is not enough to satisfy this provision, that Hammond Coleman, one of the plaintiffs, had a life estate in the land. It is not enough that he alone had an interest in the land. This would not constitute an estate in fee simple. If you should find that he has an estate in fee simple in the land, still it must be the insured who must have this estate in fee simple in the land to satisfy this provision, and therefore, if you find from the evidence that the plaintiffs were not the owners in fee simple of the land upon which the store building stood, then this policy is void, and the plaintiffs cannot recover in this action." The court further instructed the jury as follows: "This contract, gentlemen, is termed in law, an entire contract, and if you find that there has been a breach of any condition of this contract to which I have called your attention, it violates the policy, renders it void, and nothing can be recovered for either building or goods destroyed."

The effect of the instructions were, that if the fee simple title to the land on which the storehouse was situated, was not vested in the copartnership of H. Coleman & Co., but was in Hammond Coleman, a member of the copartnership, the policy of insurance was void, and the plaintiffs could not recover, either for the loss of the building, or of the goods. These instructions were excepted to by the plaintiffs, who contend they were erroneous, and, on account of which, the judgment should be reversed. The principal ground of the contention is, that the contract of insurance evidenced by the policy, is so far severable, as to entitle the plaintiffs to recover for the loss of the goods, though they may not be entitled to recover for the loss of the building by reason of the state of the title to the land on which it stood.

Whether such a contract is so severable, is a question upon which the adjudications of courts of the highest respectability are in direct conflict. The following are some of the cases which hold the contract to be entire: *Barnes v. Union etc. Ins. Co.*, 51 Me. 110; 81 Am. Dec. 562; *Havens v. Home Ins. Co.*, 111 Ind. 90; 60 Am. Rep. 689; *Cuthbertson v. North Carolina*

Home Ins. Co., 96 N. C. 480; *Essex Sav. Bank v. Meriden Fire Ins. Co.*, 57 Conn. 335.

On the other hand, such contracts are held severable, in the following, and other cases: *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53; 4 Am. Rep. 582; *Hartford Fire Ins. Co. v. Walsh*, 54 Ill. 164; 5 Am. Rep. 115; *Lochner v. Home Mut. Ins. Co.*, 17 Mo. 247; *Koontz v. Hannibal etc. Ins. Co.*, 42 Mo. 126; 97 Am. Dec. 325; *Phoenix Ins. Co. v. Lawrence*, 4 Met. (Ky.) 9; 81 Am. Dec. 521; *Merrill v. Agricultural Ins. Co.*, 78 N. Y. 452; 29 Am. Rep. 184; *Schuster v. Dutchess County Ins. Co.*, 102 N. Y. 260. And such we understand to be the effect of the decision in *Clark v. New England etc. Ins. Co.*, 6 Cush. 342, 53 Am. Dec. 44. There, the policy, for a gross premium, insured the plaintiff's "Tavern House," to the amount of two thousand two hundred dollars, and his shop, valued at three hundred dollars. The act of incorporation of the defendant provided, "that when any property insured by this company shall in any way be alienated, the policy shall thereupon be void, and should be surrendered to the directors, to be cancelled." The shop was alienated by the assured, and the "Tavern House" was afterwards destroyed by fire. It was held that the alienation of the shop did not prevent a recovery for the loss of the tavern. The court say: "The next ground taken by the defendants is, that the shop which was insured in the same policy had been alienated by the plaintiff, and that this is such an alienation as will avoid the policy. But the shop was valued separately, and was insured separately, as a separate, distinct, independent subject of insurance, though insured in the same policy. The alienation of the shop would no doubt avoid the policy *pro tanto*, and only *pro tanto*. The tavern house and shop being insured separately, the alienation of one would no more affect the insurance on the other, than if they had been insured in separate policies." In the case of *Hartford Fire Ins. Co. v. Walsh*, 54 Ill. 164, 5 Am. Rep. 115, two houses were embraced in the same policy, and insured for different sums for a gross premium paid, the policy providing, that if the insured premises should remain vacant for a certain time without notice to the company, the policy should become void; and it was held, that the fact that one of the buildings remained thus vacant without notice to the insurer, would not invalidate the policy as to the other.

The action in *Lochner v. Home Mut. Ins. Co.*, 17 Mo. 247,

was upon a fire policy covering a dwelling house and furniture therein. It was held: "A policy may be void in part and valid in part, if the subject-matter is capable of being separated; and, although a failure to disclose an encumbrance would avoid the policy as to the house insured, it would not avoid it as to furniture insured in the same policy, but separately appraised, unless the fact concealed was material to the risk." *Koontz v. Hannibal etc. Ins. Co.*, 42 Mo. 126, 97 Am. Dec. 825, was a case where a policy of insurance upon a certain livery stable was made to cover both personal and real property. The application of the assured contained a false warranty touching encumbrances upon the real estate, and it appeared that the personal property was separately appraised, and there was nothing to show that the representations as to the encumbrances upon the stable formed any inducement to the execution of the policy covering the personal property. The court held that the assured might recover the value of the latter, although the policy was rendered void as to the real estate by reason of such false warranty. The case of *Phoenix Ins. Co. v. Lawrence*, 4 Met. (Ky.) 9, 81 Am. Dec. 521, is much like the one before us. There, the appellant (company) for a premium of fourteen dollars, insured J. B. Lawrence & Co. against loss by fire, from the 25th of May, 1858, to the 25th of May, 1859, "to the amount of two hundred dollars on their frame storehouse, situated on the Ohio River, in Gallatin County, Kentucky, known as Jackson's Landing, and twelve hundred dollars on the stock of goods in said storehouse." The premises and goods were destroyed by fire on the 5th of April, 1859, and suit was brought on the policy for the value of the goods, but not for the loss of the building. One defense was, that Lawrence & Co., when they obtained the insurance, represented themselves to be the owners of the house, when in fact they were not, which, by the terms of the policy, rendered it void. But the court held that, "in the absence of proof that the plaintiffs procured the insurance upon the house for a fraudulent purpose, or that their supposed interest in the house induced the defendant to insure the goods," the insurance on the goods was not vitiated, and the plaintiff had judgment.

In the case of *Merrill v. Agricultural Ins. Co.*, 73 N. Y. 452, 29 Am. Rep. 184, the policy, for one premium, insured the plaintiff against loss or damage by fire, to the amount of six thousand dollars, as follows: "One thousand dollars on dwell-

ing house and wood house, if attached, three hundred dollars on household furniture therein, two hundred dollars on provisions, etc., therein," and various other items of property described in the policy, each having a specific valuation therein set forth. The policy contained a condition that, if the property insured was encumbered by mortgage or otherwise, unless so represented in the application, the policy should be void; also, that if it should become encumbered by mortgage, judgment, or otherwise, the policy should be void until the written consent of the company was obtained. The real estate was encumbered, and that fact was set up in defense of the action on the policy. It was claimed by the defendant, that it not only avoided the policy as to the building insured, but also as to the chattel property; and, whether it did or not, it was conceded, depended upon whether the contract was entire or severable.

In a well-considered opinion Judge Folger, after commenting upon various decisions on the subject, discusses the question on principle, and in the course of the discussion says: "It is plain from the fact of a separate valuation having been put by the parties upon the different subjects of the insurance that they looked upon them as distinct matters of contract. The effect of a separate valuation was to make them so. No matter how much value there might have been in any one of those subjects, even to the whole amount of the policy, had it been totally destroyed the defendants could not have been made liable to an amount greater than that named in the policy as the valuation of it. Thus it was at the inception of the contract distinguished from the other subjects of insurance, and the contract so made as to be capable of application to it alone. So, too, if but one of the subjects of insurance had been burned, the defendants (*ceteris paribus*) could not have avoided liability to pay for that up to the value put upon it; and if not wholly destroyed, but so far damaged as to reach in deterioration the value put upon it in the policy, the defendants would have to pay that damage; and that subject would no longer form a part of the general matter insured, and hence not a part of the continuing contract. Thus there would of necessity be a severance of the contract, worked out by the operation of its own terms. Again, the principle, in the case of a contract about several things, but with a single consideration in gross, is this, that we are not able to say that the party would have agreed for one, or for

more than one yet less than all of them, without he could at the same time acquire a right to have them all. But our daily experience and observation shows that an insurance company is as ready to insure buildings without insuring the contents, and the contents without insuring the buildings, as to insure them together; so that that principle does not press so hard in considering such a contract as that before us. Besides, it is a rule that an agreement embracing several particulars, though made at one time and about one affair, may yet have the nature and operation of several different contracts; as when they admit of being separately executed and closed, as we have instanced just above, where the contract may be taken distributively, each subject being considered as forming the matter of a separate agreement after it is so closed: Per Washington, J., *Perkins v. Hart*, 11 Wheat. 237-251; *Rodemer v. Hazelhurst*, 9 Gill, 294. In our judgment this rule applies fitly to the contract in hand. It admits of being separately executed and closed as to each of the separate subjects of insurance. When one species of the property insured is burned, a contract to insure as to that may be performed as to that alone. The insured has paid the premium. A fire doing damage to that subject, the damage may be paid for by the insurer, and that subject be thus put out of the contract, while it remains *in fieri* as to all the other subjects named in it. When there are several subjects of insurance (as there are fourteen here) separately valued, on which a gross sum is insured not exceeding the aggregate of that valuation, for the insurance of which a premium in gross is paid, it is easy to see what is the rate of premium on the whole valuation, and what is the amount of premium on each subject insured. This being so, it seems fanciful to say that if the facts thus easily reached were stated in detail in the contract, it would be severable; while not being specifically spread out, it is entire. If there were anything in the terms or nature of the particular contract, or in the circumstances of the case, or in the nature of the different subjects of the insurance, from which it was to be inferred that the insurer would not have been likely to have assumed the risk on one of several of them, unless induced by the advantage and profit of having a risk on all, that would be a rational cause for deeming the contract entire. But when for aught that appears it is indeed as likely that the insurer would have taken a risk upon any one or any few of the subjects insured,

at the same rate of premium as upon the whole, and has in the policy so separated the subjects and so singled them out by a specific valuation as that there is no difficulty in distinguishing the subject from the rest, and closing the contract as to that separately and carrying forward the contract as to the rest, it does result that the contract is severable in practical operation, and hence in law. And so also that though there may have been some conduct of the insured as to some of the property not evil in itself, but working a breach of a condition in its letter, the effect of that breach may be confined to the insurance upon that property, the contract as to that be held avoided, and as to the other subjects be held valid."

Forfeitures do not readily find favor in the law, and courts are reluctant to declare and enforce them, if, by reasonable interpretation, it can be avoided. It is not likely that, in this case, the small amount of insurance on the storehouse constituted any inducement for the insurance placed upon the stock of goods; and it does not appear that the rates upon these classes of property were different, nor how it could make any difference if they were, since the only effect, in this respect, of holding the contract severable, is, that the insurance company is enabled to retain the whole of the premium, which it accepted as the consideration for the insurance of all of the property, for the lesser risk on part of the property only; and it is not to be presumed that the premium for the insurance of part only of the property would exceed that accepted for the risk on all of it. It was not shown at the trial that the plaintiffs were guilty of any misrepresentation or intentional concealment concerning the title to the land on which the storehouse stood. No inquiry was made of them about it. The subject was not a matter of negotiation between the parties in effecting the insurance, and the plaintiffs were ignorant of the condition, for the breach of which the company claims the right to forfeit the whole policy. If the position taken by the company be correct, the condition was broken when the policy was issued; and there was, therefore, no consideration for the premium that was paid, for no risk attached; and yet the company, while asserting the invalidity of the contract, holds on to its fruits. This is not a very consistent position nor a very just one. A just result is reached, and, as we think, the lawful one, by holding, as we do, that the contract of insurance in this case is severable, and the breach of the condition as to the title of the land does not defeat the

plaintiff's right to recover for the loss of the stock of goods insured by the policy in suit. It follows that, in our view of the case, the court erred in the instructions we have referred to, for which error the judgment is reversed.

FORFEITURES ARE NOT FAVORED, and will not be enforced, unless specifically and definitely provided for in the contract: *Murray v. Home Benefit etc. Ass'n*, 90 Cal. 402; 25 Am. St. Rep. 133; *Phoenix Ins. Co. v. Tomlinson*, 125 Ind. 84; 21 Am. St. Rep. 203, and note; and see extended note to *Smith v. Mariner*, 68 Am. Dec. 85.

INSURANCE — CONTRACT WHEN ENTIRE AND WHEN SEVERABLE. — If insurance is effected upon real and personal property by a policy showing the amount for which each is insured, and the premium is a gross sum, the contract is divisible: *German Ins. Co. v. York*, 48 Kan. 488; 30 Am. St. Rep. 312. For a full discussion of this subject, see the following recent cases in this series and the notes appended thereto: *German Ins. Co. v. Fairbank*, 32 Neb. 750; 29 Am. St. Rep. 459; *Stevens v. Queen Ins. Co.*, 81 Wis. 335; 29 Am. St. Rep. 905; *Pioneer Mfg. Co. v. Phoenix Ass'n Co.*, 110 N. C. 176; 28 Am. St. Rep. 673, and especially the note thereto.

STATE v. INSURANCE COMPANY.

[49 OHIO STATE, 440.]

FOREIGN CORPORATIONS — QUO WARRANTO AGAINST. — The courts of a state in which a foreign corporation transacts business have no power to oust it of the right to be a corporation, nor of any of the franchises or privileges conferred by the laws of the state in which it was organized; but, as to the franchises or privileges which such corporation derives from the laws of the state in which it is transacting business, it is no less amenable to the jurisdiction of the domestic courts than a domestic corporation.

RETALIATORY STATUTES REGARDING FOREIGN INSURANCE COMPANIES, HOW CONSTRUED, AND WHEN ENFORCEABLE. — A statute which provides that, "when by the laws of any other state or nation, any taxes, fines, penalties, license fees, deposits of money or of securities, or other obligations or prohibitions are imposed on insurance companies of Ohio doing business in such state or nation, or upon their agents therein, so long as such laws continue in force, the same obligations and prohibitions of whatever kind, shall be imposed upon all insurance companies of such other state or nation doing business within Ohio and upon their agents here," is retaliatory and penal in its character, and must be strictly construed. It is not permissible to read into an enactment of this kind words not found in its text, for the purpose of giving it a construction in conformity with its supposed policy. Therefore the mere existence of a discriminating statute in another state is not a sufficient ground for calling such an enactment into operation, unless it is shown that there is a domestic insurance company actually organized and liable to be affected by such discrimination.

INSURANCE COMPANIES — ORGANIZATION OF — WHEN COMPLETE FOR PURPOSE OF ENFORCING RETALIATORY STATUTES. — A statute imposing upon foreign insurance companies doing business in Ohio the same obligations and prohibitions which the states or nations to which such corporations belong have imposed upon the insurance companies of Ohio, cannot be put into operation, unless the complete and regular organization of a domestic company is proved. Articles of incorporation do not make a company, and the mere filing and recording of such articles, without the subscription of any stock or election of directors, is not such an organization as will enable the state to proceed in *quo warranto*, under the provisions of the above-mentioned statute, against a foreign insurance company.

OFFICERS — MINISTERIAL AND JUDICIAL ACTS. — The act of the superintendent of insurance in issuing a license to a foreign insurance company for the transaction of business is ministerial, not judicial, and such a license, although it will protect the company in the transaction of business during its continuance, is not a bar to a proceeding in *quo warranto* when the company is found to be exercising any of the franchises of the state, without authority of law.

PROCEEDING in *quo warranto*. The material facts are stated in the opinion.

David K. Watson, attorney-general, and Harrison, Olds and Henderson, for the plaintiff.

W. J. Gilmore, for the defendant.

MINSHALL, J. 1. The defendant is a fidelity and casualty insurance company, organized under the laws of the state of New York, and doing, in this state what, by the laws of New York, is authorized and known as four lines of such insurance, to wit: 1. Against injury, disablement, or death of persons resulting from traveling, or general accidents by land or water; 2. Guaranteeing the fidelity of persons holding places of public or private trust; 3. Upon plate glass against breakage; 4. Upon steam boilers against explosion, and against loss or damage to life or property resulting therefrom. Its right to do more than one of such lines of business in this state is challenged by the attorney-general, on the ground that, by the laws of New York, no company incorporated in this state can transact in that state more than one of such lines of insurance; and, therefore, under the provisions of section 242, Revised Statutes, of this state, it has no right to make in this state more than one of the lines of insurance it is doing. That section reads as follows:—

“When, by the laws of any other state or nation, any taxes, fines, penalties, license fees, deposits of money, or of securities, or other obligations or prohibitions are imposed on in-

insurance companies of this state, doing business in such state or nation, or upon their agents therein, so long as such laws continue in force, the same obligations and prohibitions, of whatever kind, shall be imposed upon all insurance companies of such other state or nation doing business within this state, and upon their agents here."

A demurrer to the petition, objecting to the jurisdiction of the court, as well as to the sufficiency of the pleading, having been overruled, the defendant, as a third defense to the petition, answered: "That under the laws of New York it is legally authorized and empowered to do, and is now doing, the four lines of insurance in that state, which the petition charges it with illegally doing in Ohio; and that under the laws of Ohio a corporation could be legally incorporated and organized with power to do the same four lines of insurance, or any one or more of them therein, but that no such company has yet been organized to do said four lines of insurance in Ohio, and hence no such company has yet made, or could make, application to the proper officers in New York for a license to do said four lines of insurance in the state of New York." A demurrer to this defense having been overruled, the plaintiff asked leave to reply in substance as follows: That on January 13, 1887, the requisite number of persons, citizens of Cuyahoga County, "subscribed and acknowledged articles of incorporation," stating therein the name, place of business, and capital stock of the proposed corporation, and its object, to wit: Under paragraph 2 of sec. 3641, Revised Statutes, to do the four kinds of insurance now being done by the defendant in this state; and the same having been approved by the attorney-general as in conformity to the laws of the state, were then filed and recorded in the office of the secretary of state of Ohio, "whereby," it is averred, "an Ohio corporation was duly and legally formed for the purpose of doing the lines of insurance mentioned in the articles of incorporation."

As no report has heretofore been made of any of the rulings of the court in the progress of the case, it is proper that two of them should be noticed before passing on the application for leave to reply; that is to say: 1. The jurisdiction of the court; and 2. The sufficiency of the third defense.

1. It is claimed that as the defendant is a foreign corporation it cannot be affected by a proceeding in *quo warranto* in the courts of this state. That it cannot be ousted of the right-

to be a corporation nor of any of the franchises conferred on it by the laws of New York, is not doubted; but as to such franchises and privileges as are derived from the laws of the state of Ohio, it is as much amenable to the courts of this state as an Ohio corporation, and when found exercising such franchises without authority of law, it may be ousted therefrom, as held in *State v. Western Union etc. Ins. Co.*, 47 Ohio St. 167, decided since the commencement of this action.

2. Upon the facts stated in the third defense it is claimed, that the defendant is not affected by the provisions of section 282 of the Revised Statutes, on which the demand of the state is based. The character of this section is relative to its construction. It is claimed to be reciprocal in character, and should therefore be liberally construed. A little reflection will, we think, show that it is not of this nature, but upon the other hand, retaliatory, and should therefore be strictly construed; or in other words, not applied to a case that does not fairly fall within its letter. Reciprocity expresses the act of an interchange of favors between persons or nations; retaliation, that of returning evil for evil, or disfavor for disfavor. Accurately speaking, we reciprocate favors and retaliate disfavor. This then is a retaliatory statute. It treats the companies of other states as Ohio companies are treated in those states; but the moment it is made to appear that Ohio companies are not treated with the same favor in another state, that companies of that state are treated in Ohio, a case is made for the application of its provisions, and retaliation follows as a result.

It is true that the ultimate object of the statute is to secure reciprocity; but what we have now to do with, is not its ultimate, but its immediate object, and that is to retaliate on the companies of a given state, disfavor shown to Ohio companies in the same state.

The question then arises, the averments of the third defense being admitted, is a case made for the application of the provisions of the statute to the defendant? We think not. It is admitted that Ohio companies may be, but it is averred that none have been, formed to do the four lines of insurance which the defendant is doing in this state. Hence, no case is made for the application of the statute—the language being, “When, by the laws of any other state any prohibitions are imposed on insurance companies of this state, doing business in such state,

so long as such laws continue in force the same prohibitions, of whatever kind, shall be imposed upon all insurance companies of such other state doing business in this state." To bring a case within the statute, there must at least, be an Ohio company formed to which the prohibitions of the New York statute would apply, should it attempt to enter and do business in that state. It is said that the very reason that there are no such Ohio companies, may be the existence of this New York statute. This is a very remote conjecture, yet admitting its possibility, does not vary the language of our statute. If it should be deemed desirable to foster the formation of such Ohio companies to do business in other states, it can easily be accomplished by the legislature making the statute apply where Ohio companies may be, as well as where they are, formed to do such business in other states. We do not believe that any lawyer would affirm that an indictment drawn upon such a statute as this would be good, that failed to aver the existence of an Ohio company to which the discriminating features of the statute of the other state might apply. And there is no reason why a different rule of construction should be adopted in this proceeding. The consequences to the defendant are of a penal nature. If found guilty as charged, it must not only abandon the business it has established, but cease to do more than one of its lines of business in the state, so long as the legislation of the two states remains unchanged.

In construing this statute according to its letter we have, as we believe, given expression to the intention of the legislature. It is a just compliment to human nature to say that, as a general rule, every man would prefer to have his favors construed largely and his disfavours narrowly. In other words, no one would deliberately do more injury to another than is required by his own interests, and would regard it as an honor to be as generous as he could, and that such are the sentiments of the civilized man, is apparent from all writers upon public law.

Decisions in some of the other states have been cited which, it is claimed, sustain the construction placed on our statute by the relator. We have examined these decisions, and find none of them upon statutes worded as our own. The case of *State v. Fidelity etc. Co.*, 77 Iowa, 648 (being the same company defendant in this case), is relied on as in point. By the language of the statute in that state (Iowa), it is put into

operation, "when, by the laws of any other state, any . . . prohibitions are imposed, or would be imposed, on insurance companies of this state doing, or that might seek to do, business in such other state." It was there held that through the language of their statute just quoted, the existence of the law in another state is sufficient to put the law of Iowa in force without showing that the state of New York has ever actually enforced its law against an Iowa company. But we submit that this is so by reason of language found in the Iowa statute, and which is not found in our statute; and to give to our statute the same construction would require us to read into it language found only in the Iowa statute. The following cases are also cited as authority: *Phoenix Ins. Co. v. Welch*, 29 Kan. 672; *State v. Fidelity etc. Ins. Co.*, 39 Minn. 538; *Home Ins. Co. v. Swigert*, 104 Ill. 655; *Talbott v. Fidelity etc. Co.*, 74 Md. 536. The wording of the statute in each case, as before stated, differs from our own; but if it were otherwise we should require more cogent reasons than any that have been suggested to induce us to depart from well-recognized principles of construction, by reading into a statute of this character words not found in its text, for the purpose of giving it a construction in conformity to its supposed policy.

8. The next question is, should leave be given to file the proposed reply to the third defense? We think not, for the reason that it does not show that an Ohio company has been formed to do the four lines of insurance in which the defendant is engaged. It will be observed that it does not aver that any officers or directors have been chosen, or that any of the stock has been subscribed, or that any organization whatever has been effected. It is simply that "articles of incorporation" have been made and filed and recorded in the office of the secretary of state. Articles of incorporation do not make an incorporated company; they are simply authority to do so.

Before disposing of the case it may be well enough to notice another defense relied on in the answer, and to which a demurrer has been sustained, and that is, the license granted the defendant to do business in this state by the superintendent of insurance. We are all of the opinion that the issuing of a license to a foreign insurance company to do business in this state is a ministerial and not a judicial act, and whilst it will protect the company in the transaction of its business during its continuance, is not a bar to a proceeding against it *in quo warranto*, where it is found to be exercising any of the

franchises of the state without authority of law: *State v. Fidelity etc. Ins. Co.*, 39 Minn. 538, and cases cited in brief of counsel for relator.

Application for leave to reply to the third defense of the answer overruled, and petition dismissed.

FOREIGN INSURANCE COMPANIES.—RETALIATORY STATUTES: See extended note to *People v. Fire Ass'n*, 44 Am. Rep. 391. When the law of another state requires insurance companies of this state to pay license fees, etc., for the privilege of doing business therein, then our law will require a company of that state to pay the same license fees for doing business here: *Germania Ins. Co. v. Swigert*, 128 Ill. 237; *State v. Insurance Co.*, 115 Ind. 257; *Blackmer v. Royal Ins. Co.*, 115 Ind. 291. When a statute of New York imposes obligations or prohibitions on insurance companies of Maryland doing business in New York not imposed by the Maryland statute on New York companies doing business in Maryland, such obligations must be treated as if found in so many words in the Maryland statute and will be enforced accordingly: *Talbott v. Fidelity etc. Co.*, 74 Md. 536. The New Hampshire laws impose upon Massachusetts insurance companies acting here, the same obligations and disabilities that the laws of Massachusetts impose upon New Hampshire companies acting there: *Haverhill Ins. Co. v. Prescott*, 42 N. H. 547; 80 Am. Dec. 123.

RAILROAD COMPANY v. O'DONNELL.

[49 OHIO STATE, 489.]

TROVER, WHAT ALLEGATIONS ARE NECESSARY IN AN ACTION FOR.—The petition in an action for conversion need not contain an allegation that the plaintiff demanded the property, and that the defendant refused to deliver it. If the plaintiff's ownership of the property and its value are properly alleged, and there is an averment that the defendant converted such property to his own use, a cause of action is sufficiently stated.

TROVER—CONVERSION BY CARRIER—WHAT CONSTITUTES.—A common carrier, who, having received goods to be conveyed to a designated place, transports them to another place, in order to prevent their coming into the possession of the consignee and to deprive him of their use and disposition, is liable for the conversion of such goods.

TROVER—THE OWNER OF PROPERTY CONVERTED IS NOT OBLIGED TO RECEIVE IT AFTER THE CONVERSION.—Hence, if a carrier has once been guilty of the conversion of goods delivered to him for transportation, no tender of the goods to the owner, nor refusal by such owner to receive them, will have the effect of relieving the carrier from liability for their subsequent loss.

CARRIERS—WHEN EXCUSED FOR NONDELIVERY CAUSED BY AN ACT OF PUBLIC AUTHORITY.—The exemption of a carrier from liability for the nondelivery of goods caused by the act or mandate of public authority extends to those cases in which the goods are taken from his possession by legal process against the owner, or in which they become, without his fault, obnoxious to the requirements of the police power of the state, and are injured or destroyed by its authority; as where they are infected

with contagious disease, or are intoxicating liquors intended for use or sale in violation of the laws of the state, which require their seizure and destruction. But, in order to protect the carrier in such cases, it is necessary that the seizure be made without the procurement or connivance of the carrier; that the proceeding or process under which it was made was valid; and that the carrier gave prompt notice thereof to the owner.

TROVER — MOTIVE OF PERSON CONVERTING PROPERTY, NOT AVAILABLE AS A DEFENSE. — The motive by which a party was controlled in the conversion of property may be shown to prevent the recovery of exemplary damages, but is of no avail as a defense to an action of trover.

CARRIERS, HOW FAR EXCUSED FOR DELAY IN DELIVERING GOODS. — A carrier is bound to provide sufficient and suitable means for the carriage of the goods of shippers, and to make delivery thereof with all convenient dispatch; and, while accidents will excuse delay, they do not put an end to the contract. As soon as the impediment to the transportation of the property is removed, or can reasonably be overcome, the carrier must complete the contract without further delay.

TROVER — CONVERSION OF GOODS BY CARRIER. — THE MEASURE OF DAMAGES in an action for mere delay in the delivery of goods is ordinarily the difference between their value on the day on which they should have been delivered and their value on the day on which they are actually ready for delivery, and, in addition to that amount, reasonable expenses occasioned by the delay may also be allowed in such a case. But, if there has been a conversion of the goods, the measure of damages is their value at the time of the conversion, and the fact that the consignee has afterwards had an opportunity of receiving them, and has refused to take them, is not a ground for applying a different rule.

TROVER — CONVERSION OF GOODS BY CARRIER, PREREQUISITES TO ACTION FOR. — The consignee of property cannot maintain an action against the carrier for its recovery without first tendering the amount of the carrier's legal charges and advances, but such tender is not a prerequisite to an action for damages for the unlawful conversion of the property by the carrier.

ACTION for the conversion of property by a carrier. The material facts are stated in the opinion of the court.

C. H. Kibler, for the plaintiff in error

J. B. Jones and J. A. Flory, for the defendant in error.

WILLIAMS, J. 1. A question of pleading presented by the record, will be first noticed. That question arises upon the refusal of the court to give in charge to the jury, an instruction, requested by the defendant below, to the effect that the action could not be maintained as one for conversion, because the petition failed to aver a demand for the property. It is contended, that where the property of one person has lawfully come to the possession of another, a refusal by the latter to deliver it to the owner on his demand is necessary to constitute a conversion of it, and therefore, the petition, in an

action for its conversion, must contain an allegation of such demand and refusal.

The allegation is not essential. A refusal to deliver the property on demand of the owner, may show such an assumption of ownership or control of it, as to afford satisfactory evidence of a conversion, but it is only evidence. The ultimate fact to be pleaded is the conversion; and in actions of that nature, a petition which, with proper allegations of the plaintiff's ownership of the property, and of its value, avers that the defendant converted it to his own use, states a cause of action.

2. It is claimed the trial court erred in its refusal to instruct the jury that, if the goods described in the petition were tendered to the plaintiff, on the fourth day of May, 1885, and he refused to take them into his possession, and they were afterward, without the fault or negligence of the defendant, stolen and lost, the plaintiff could not recover.

The evidence tended to show, that the goods arrived at the defendant's depot in Shawnee on the morning of the 4th of May, 1885, and the same day the plaintiff saw them there, but did not take them away. The next day, notice of the arrival of the goods was received by the plaintiff, through the mail, and the night following they were stolen from the depot where they had been placed by the defendant; none of them were recovered, and the perpetrators of the crime are unknown.

The claim of the plaintiff in error is, that upon the failure of the plaintiff below to take possession of the goods, after notice of their arrival, the liability of the defendant as a carrier ceased, and its obligation became that of a bailee only, which was to use ordinary care for the preservation of the property; and, as the property was lost without the fault or negligence of the defendant, it could not be held responsible for the loss. As a general rule, when the carrier has done all that the law requires toward effecting a delivery of the property, but is unable to accomplish it, and the property is so necessarily continued in his possession, his obligation becomes that of a depositary only. He is no longer an insurer of the property, and may show that it was lost without his fault or negligence, and thereby exonerate himself from liability. But what is required with respect to the delivery, is not the same as to all classes of carriers. The undertaking of express companies is to make delivery of the property intrusted to them for carriage, to the consignee personally, with all

reasonable dispatch; and to this obligation they are held by the law with great strictness. An exception has been made to this rule, in some cases, where the business of the company is so small at the place of delivery, as not to justify the employment of the necessary means of making immediate personal delivery. In those cases, it is held, that the conduct of the company must be in conformity with a usage in reference to which it is presumed the parties contracted: *Baldwin v. American Express Co.*, 23 Ill. 197; 74 Am. Dec. 190; *American etc. Express Co. v. Schier*, 55 Ill. 140; and it is incumbent on the company to establish the facts which give rise to the exception to the general rule governing its liability.

But, without deciding whether the facts stated in the instruction requested, would relieve the defendant, if there were no other issue to be passed upon, the instruction is open to the objection, that if given, it would have required the jury, simply upon the finding of those facts, to return a verdict for the defendant, notwithstanding others, which the evidence established to the satisfaction of the jury, would render the defendant liable, and entitle the plaintiff to the verdict. The claim of the plaintiff was, that the defendant had converted his goods to its own use, before they were taken to Shawnee. His action for their conversion had been brought some months before they reached that place, and was pending when they arrived. He gave evidence tending to prove that the defendant received the goods at Newark, for transportation by express, on the second day of January, 1885, and the goods not having arrived at their destination, the plaintiff went to Newark to hunt them up, where he made inquiry about them, of the agent of the defendant at that place, who informed him he did not know where they were.

The evidence further tended to show that defendant's agent at Newark, on the fifth day of January, 1885, and before his interview with the plaintiff, had, under the direction of the defendant's officers, shipped the goods to Baltimore, Maryland, consigned to the care of an officer of the defendant company, who received them, and held them there until the following May; and that they were so shipped to, and detained at, Baltimore, for the purpose of preventing their coming to the possession of the plaintiff, and depriving him of their control and disposition. The defendant claimed it was justified in the course it pursued, upon grounds which will be noticed hereafter. Whether the justification was made out was a

question of fact for the jury, under the instructions of the court, which will also be hereafter noticed. Unless the justification was established, there appears to have been evidence, as shown by the record, from which the jury might find, as they did, that there was a conversion of the goods by the defendant; for, in order to constitute a conversion, it was not necessary that there should have been an actual appropriation of the property by the defendant to its own use and benefit; it might arise from the exercise of a dominion over it in exclusion of the rights of the owner, or withholding it from his possession under a claim inconsistent with his rights. If one take the property of another, for a temporary purpose only, in disregard of the owner's right, it is a conversion. Either a wrongful taking, an assumption of ownership, an illegal use or misuse, or a wrongful detention of chattels, will constitute a conversion. "Whoever," said Chief Justice Holt, in *Baldwin v. Cole*, 6 Mod. 212, "takes upon himself to detain another man's goods from him without cause, takes upon himself the right of disposing of them," and is guilty of conversion. If a person hire a horse to go to a particular place or a specified distance, and he go to another place or greater distance, that is a conversion of the horse: *Fish v. Ferris*, 5 Duer, 49; *Lucas v. Trumbull*, 15 Gray, 306; *Wheelock v. Wheelwright*, 5 Mass. 104. Upon the same principle, a common carrier, who, having received goods to be carried to a designated place, transports them to another place for the purpose of preventing their coming to the possession of the consignee, and depriving him of their use and disposition, is liable for the conversion of the goods. After the conversion has taken place, the owner is under no obligation to receive the property: *Brewster v. Silliman*, 38 N. Y. 423. So that, if there was a conversion of the plaintiff's goods by the defendant prior to the 5th of May, when he was notified they had reached Shawnee, his right of action for their value was complete; and any loss of the goods occurring after the conversion must fall upon the defendant. No tender of the goods after the conversion, nor refusal to accept them, could cast the loss upon the plaintiff, because he was not then obliged to receive them. It would have been error, therefore, in view of the evidence tending to establish the conversion, to give the instruction requested, which would have required the jury to find for the defendant, if the goods were stolen without its negligence, notwithstanding they should also find such prior conversion of them by the defendant.

8. The principal contention of the plaintiff in error is, that there was no conversion, because it was justified, upon the grounds stated in its answer, in withholding the property from the plaintiff below, and removing it from the state.

The ground chiefly relied on is, that when the goods were received for transportation, a state of lawlessness amounting to insurrection existed at the place to which they were consigned; and that the goods, which consisted entirely of firearms and ammunition, were purchased and consigned to the plaintiff, to be used in aid of the insurrection; knowledge of which, having come to the defendant's officers, they deemed it improper to deliver the goods to the plaintiff, and, after consulting the governor of the state, and under his advice, as it is claimed, they caused them to be taken to Baltimore, and there detained until the May following, when they were re-shipped to Newark, and thence to Shawnee. All these allegations of the answer, except that the property was removed out of the state, and there detained, were denied by the reply, and the issues of fact thus raised were submitted to the determination of the jury.

There was evidence tending to show that at Shawnee and vicinity, and in the Hocking valley, distant some six miles or more from Shawnee, there were numerous coal mines, operated by different owners, where a large number of miners were employed. In the fall of 1884, the operatives were on a "strike," owing to a disagreement about their wages. Operations at some of the mines were suspended, while to continue some of those in the Hocking valley, miners were brought in from other localities to take the place of those who had refused longer to work. Apprehensions were entertained by those operators who had employed miners from other places, that the "strikers," as they are called by the witnesses, would destroy or injure their property, and forcibly prevent their recent employees from working in the mines. These operators employed persons to keep watch over their property, and prevent interference with their new employees. Fires broke out at some of the mines, and at a tunnel on defendant's road near Shawnee, which the strikers were suspected by the defendant and others of having caused; and considerable alarm existed in that region. The testimony is conflicting as to the extent of the trouble and its duration, but it continued until after January, 1885, and gradually passed away with-

out any outbreak of violence or obstruction of the lawful authorities.

The plaintiff gave evidence tending to prove that the goods consigned to him were purchased for lawful purposes, and were intended for no other use; that he kept a store in Shawnee, where he expected to make lawful sales of these, and other goods of the kind, for which there was a general demand.

The court charged the jury, in substance, that if they found the facts to be as alleged by the defendant, it was justified in withholding the goods from the plaintiff; otherwise it was not. No exception was taken to the charge, nor was any request made for further instructions on the subject. There is an exception, purporting to be to that part of the charge, "stating to the jury that no testimony as to the advice of Governor Hoadly should be considered by them." But we have been unable to discover that statement in the charge. The verdict was for the plaintiff upon all the issues. It is not the duty of this court, as it was that of the circuit court, to weigh the evidence, and determine whether it was sufficient to sustain the verdict. We cannot say there was no evidence tending to prove these issues for the plaintiff; nor is the lack of such evidence assigned as error here, or advanced in argument. We see nothing in the charge on this branch of the case of which the plaintiff in error can justly complain. It is not claimed the liability of the defendant was limited by special contract. Its obligation was therefore that imposed by the rules of the common law which made it an insurer of the goods against all losses, except those arising from the act of God or the public enemies, or from the conduct of the shipper, or the inherent nature of the goods, or, as is held in some cases, from the act or mandate of public authority. With respect to the last exception stated above, the rule seems to be now established that a common carrier is not liable, if the goods be taken from his possession by legal process against the owner, or if without his fault, they become obnoxious to the requirements of the police power of the state, and are injured or destroyed by its authority; as where they are infected with contagious disease, or are intoxicating liquors intended for use or sale in violation of the laws of the state, which require their seizure and destruction: *Wells v. Main Steamship Co.*, 4 Cliff. 228; *Blivin v. Hudson Riv. R. R. Co.*, 86 N. Y. 407. But in order to protect the

carrier in such cases, it is necessary that the seizure be made without the procurement or connivance of the carrier; that the proceeding or process under which it was made appear to be valid, and that the carrier give prompt notice to the owner: *Gibbons v. Farwell*, 63 Mich. 344; 6 Am. St. Rep. 301; *Kiff v. Old Colony etc. R'y Co.*, 117 Mass. 591; 19 Am. Rep. 429; *Blivin v. Hudson Riv. R. R. Co.*, 36 N. Y. 403; *Ohio etc. R'y Co. v. Yohe*, 51 Ind. 181; 19 Am. Rep. 727. "The principle of the exception," it is said in *Wells v. Main Steamship Co.*, 4 Cliff. 228, "is, that the carrier is not obliged to violate the law of the jurisdiction to comply with its contract."

In *Atkinson v. Ritchie*, 10 East, 534, it is held that the contract of a common carrier is always subject to the implied condition that he may lawfully comply with its terms; and if its performance subsequently becomes unlawful without his fault, he is not required to violate the law of the jurisdiction to complete his undertaking. We see no reason why the exception might not be extended to embrace cases where fire-arms, intended to be used in promoting riots and public disturbances, are seized by the public authorities to prevent such use of them. But the question is not fairly before us. The jury must have found that the arms and ammunition consigned to the plaintiff were purchased and intended for lawful purposes, unless indeed the sale of such property in this state is of itself unlawful. We have been referred to no statute making it so, and know of none, except the one prohibiting the sale of property of that description to minors under the age of fourteen years. The prohibition might wisely be much extended; but that is a matter of legislative policy. The record leaves no doubt that in causing the property to be removed from the state and withheld from the plaintiff, the officers of the defendant were prompted by commendable motives, and acted under a sincere belief they were subserving the public good. But the motive by which a party was controlled in the conversion of property is of no avail as a defense, though it may be shown to prevent the recovery of exemplary damages: *Gibbons v. Farwell*, 63 Mich. 344; 6 Am. St. Rep. 301; *Harker v. Dement*, 9 Gill, 7; 52 Am. Dec. 670.

4. The only other ground which the defendant plead as a justification of its failure to carry the goods to their destination in due course of transit was, that a tunnel on its road between the place of shipment and that to which the goods were consigned had been set on fire by the plaintiff's associates,

with his knowledge, which rendered it impossible for the defendant to perform its contract. This was put in issue by the reply. The evidence shows that the tunnel, called the Bristol tunnel, was discovered to be on fire on the morning of the 1st of January, 1885, but the origin of the fire was not shown; nor did the evidence implicate the plaintiff with it, or show that he had any knowledge of how it was caused. It further appeared that within a few days afterwards arrangements were made by the defendant by which the express matter carried either way on the road could be and was transferred around the tunnel, and the plaintiff's goods could have been so transferred and delivered to him as soon as January 7, 1885.

The instructions of the court upon this issue were to the effect that if the tunnel was rendered impassable for cars, the defendant was excused from making delivery until the obstruction ceased, or other means of effecting the delivery could reasonably be procured; and then further delay in making the delivery, on account of the tunnel, was not excused, unless the obstruction was caused in whole or in part by the plaintiff. No exception was taken to this part of the charge, and it appears entirely unobjectionable. The defendant was bound to provide sufficient and suitable means for the carriage of the goods, and make delivery of them with all convenient dispatch; and while accidents and obstructions will excuse delay, they do not put an end to the contract. As soon as the impediment to the transportation of the property is removed or can reasonably be overcome, the carrier must complete the contract without further delay.

5. It is further claimed that the court erred in its refusal to give in charge an instruction requested on the measure of damages; which was, in effect, that if the plaintiff had an opportunity of receiving the goods on the fourth day of May, 1885, and refused to take them, his only measure of damages was the difference between their value on that day and on the 5th of January preceding.

This instruction might have been proper if there were no question of the conversion of the property by the defendant involved in the case. If the failure to deliver the goods arose from delay merely, the measure of damages is ordinarily that stated in the request, though reasonable expenses occasioned by the delay may also be allowed in such cases. But the measure of damages was not made to depend, by the instruc-

tion requested, upon whether the failure to deliver the property was the result of delay merely; and to have given it would have left the jury no alternative but to fix the damages according to that measure, though they should find in favor of the plaintiff on the question of conversion. If there was a conversion of the goods by the defendant, a different rule of damages applies, which is the value of the property at the time of its conversion.

6. Finally, it is contended the court committed an error in refusing to instruct the jury that to enable the plaintiff to recover any damages, it must appear that he tendered the defendant the amount of its legal charges and advances.

The action was not one for the recovery of the property, but for its unlawful conversion. The rule contended for may be a sound one when applied to actions of the former class, but it has no application to those of the latter class.

There being no substantial error in the record, the judgment is affirmed.

CONVERSION. — PROOF OF DEMAND AND REFUSAL ARE NOT NECESSARY IN AN ACTION FOR, where there has been an actual conversion: *Newsum v. Newsum*, 1 Leigh, 86; 19 Am. Dec. 739; *Jewett v. Patridge*, 12 Me. 243; 28 Am. Dec. 173; *Houston v. Dyche*, Meigs, 76; 33 Am. Dec. 130; *Webber v. Davis*, 44 Me. 147; 69 Am. Dec. 87; *Harker v. Dement*, 9 Gill, 7; 52 Am. Dec. 670; *Simpson v. Carleton*, 1 Allen, 109; 79 Am. Dec. 707; *Knipper v. Blumenthal*, 107 Mo. 665. Demand is not necessary where the defendant has bought the property from one who had no right to sell: *Hyde v. Noble*, 13 N. H. 494; 38 Am. Dec. 508; *Tuttle v. Campbell*, 74 Mich. 652; 16 Am. St. Rep. 652; *Velsian v. Lewis*, 15 Or. 539; 3 Am. St. Rep. 184; but it was held in *Burckhalter v. Mitchell*, 27 S. C. 240, that one who, in ignorance of plaintiff's claim to a horse, honestly purchased it from one who had tortiously obtained possession, is entitled to demand before the action is brought. See, also, as to demand before suit, note to *Bolling v. Kirby*, 24 Am. St. Rep. 807, 808.

CONVERSION. — CARRIER WHEN GUILTY OF: See note to *Bolling v. Kirby*, 24 Am. St. Rep. 815, 816. The failure of a carrier to deliver goods to the true owner is a conversion: *Missouri Pac. R'y Co. v. Heidenheimer*, 82 Tex. 195; 27 Am. St. Rep. 861.

TROVER. — RESTORATION OF PROPERTY CONVERTED, WHETHER OWNER MAY BE REQUIRED TO ACCEPT: See note to *Bolling v. Kirby*, 24 Am. St. Rep. 808-811. The return of the property after conversion is no bar to the action, but is admissible in mitigation of damages: *Bigelow Co. v. Heintze*, 53 N. J. L. 69. The defendant cannot force upon the plaintiff the alternative of accepting the property or of paying costs: *Stephens v. Koonce*, 109 N. C. 266.

CARRIERS — LIABILITY FOR GOODS SEIZED UNDER LEGAL PROCESS. — A carrier of goods is excused for the nondelivery of goods seized under process sued out against their owner: *Jewett v. Olsen*, 18 Or. 419; 17 Am. St.

Rep. 745; *Pingree v. Detroit etc. R. R. Co.*, 66 Mich. 143; 11 Am. St. Rep. 479; *Gibbons v. Farwell*, 63 Mich. 344; 6 Am. St. Rep. 301; but is answerable unless he can show that the officer has a legal right to take the goods: *Bennett v. American Express Co.*, 83 Me. 236; 23 Am. St. Rep. 774; *Gibbons v. Farwell*, 63 Mich. 344; 6 Am. St. Rep. 301.

TROVER—INTENT OF PERSON CONVERTING GOODS—HOW FAR A DEFENSE: See note to *Bolling v. Kirby*, 24 Am. St. Rep. 804-806. The motive influencing defendant is material only in repelling a recovery of exemplary damages: *Harker v. Dement*, 9 Gill, 7; 52 Am. Dec. 670.

CARRIERS.—DELAY IN DELIVERY may be excused by a temporary obstruction, but the carrier is bound to complete the delivery as soon as he can do so after the removal of the unavoidable cause of delay: *Bennett v. Byram*, 38 Miss. 17; 75 Am. Dec. 90.

TROVER.—MEASURE OF DAMAGES for converting property is its value at the time of conversion: *Moody v. Whitney*, 38 Me. 174; 61 Am. Dec. 239; *White v. Martin*, 1 Port. 215; 26 Am. Dec. 365; *Baker v. Wheeler*, 8 Wend. 505; 24 Am. Dec. 66; *Clark v. Whitaker*, 19 Conn. 319; 48 Am. Dec. 160; *Lee v. Mathews*, 10 Ala. 682; 44 Am. Dec. 498; *Budd v. Multnomah St. Ry Co.*, 15 Or. 413; 3 Am. St. Rep. 169; *Beede v. Lamprey*, 64 N. H. 510; 10 Am. St. Rep. 426; *Omaha etc. Refining Co. v. Tabor*, 13 Col. 41; 16 Am. St. Rep. 185. If defendant returns the property after its conversion, the plaintiff will not recover its value, but the damages he has sustained by the wrongful act, which constituted the conversion: *Bigelow Co. v. Helms*, 53 N. J. L. 69. As to the general rule that a return of the property after conversion is a ground for mitigation of damages, see note to *Bolling v. Kirby*, 24 Am. St. Rep. 811.

BRUNDRED v. RICH.

[49 OHIO STATE, 640.]

CARRIERS—DISCRIMINATION IN FAVOR OF A SHIPPER.—A contract by which a railroad company binds itself to carry for one shipper at half the rate it agrees to charge all others for the same service, in consideration of his agreeing to establish a system of pipe lines to its road, and by which, at the same time, and for the same consideration it also engages to charge all other shippers double the amount as a fixed open rate, and to pay the favored shipper one half of such amount when collected, is contrary to public policy and void.

ASSUMPSIT, WHEN LIES IN FAVOR OF ONE SHIPPER AGAINST ANOTHER.—

When a railroad company in pursuance of an unlawful agreement, by which it has bound itself to charge all but one shipper a certain amount for the carriage of goods, and to pay such favored shipper one half of the amount, when collected, has charged and collected certain sums, as freight, from another shipper ignorant of the agreement, and has paid them over to the other party, the second shipper may, on discovering the fraud, maintain an action against that party for money had and received to his use.

FRAUD VITIATES EVERYTHING INTO WHICH IT ENTERS.—There is nothing so sacred in a certificate of incorporation as to take it out of the reach of this principle. Therefore, the favored shippers who, in pursuance

of an unlawful agreement between them and a railroad company, by which they are to be paid one half of the freight collected from other shippers, have received the money which constitutes their stipulated share of the amount collected from one of the shippers against whom the discrimination has been exercised, cannot defend themselves against an action brought by that shipper for the recovery of such money by showing that they have organized themselves into a corporation, if the evidence shows that the organization was not effected in good faith, but merely for the purpose of carrying out the illegal agreement, and shielding themselves from the consequence of receiving the money illegally exacted in accordance with its terms.

ACTION to recover money alleged to have been unlawfully exacted from the plaintiff as freight by the Cleveland and Marietta Railroad Company, on crude petroleum shipped by him over the company's road from Macksburg to Marietta. Plaintiff alleged that at Macksburg, Ohio, he was engaged in the business of producing and shipping petroleum, and at Marietta, in the same state, was interested in refining the same product, and that the road of the Cleveland and Marietta Railroad Company was the only one by which he could make shipments; that the "defendants William J. Brundred, Benjamin F. Brundred, Theodore D. Dale, and Charles N. Royce, and the said Cleveland and Marietta Railroad Company became parties to an agreement in writing whereby, among other things, the said Cleveland and Marietta Railroad Company was to charge all shippers of such petroleum oil from said Macksburg to said Marietta an open rate of thirty cents per barrel freight thereon, and to collect such freight from all shippers, and to pay over to said defendants one-half part of all of such freight so charged and collected as such open rate; that said contract was made and entered in the year 1883, and by its terms was to be in force for the term of twenty years from and after its date, and, among its other stipulations therein made, said railroad company bound itself not to charge said thirty cents rate during the running of said term without the consent of defendants or their assigns; that the original parties to said contract were said Cleveland and Marietta Railroad Company of the first part, and said William J. Brundred and Theodore D. Dale of the second part; and that before January 1, 1884, and after the making of said contract, said Benjamin F. Brundred and Charles N. Royce became parties thereto by assignment from said original parties of the second part; thereafter, about May, 1884, the Ohio Transit Company, a corporation about that time organ-

ized under and by virtue of the laws of Ohio, and thenceforth to the present existing as such, became, by assignment, a party to said contract, thereby nominally acquiring all the rights of the parties of the second part and their assigns thereunder. "The said plaintiff further says that said defendants were the promoters of said Ohio Transit Company, caused it to be organized, and became, and have been ever since its organization, its principal stockholders and its managing officers; that they were producers, dealers in, and shippers of such petroleum oil from said Macksburg and vicinity, and in their operations handled and had the shipping of nearly all of the said oil shipped from said Macksburg and vicinity, aside from that shipped by plaintiff at the time of their becoming parties to said contract, and causing the same to be performed, and up to the time of the organization of said Ohio Transit Company; that from the time said Ohio Transit Company became their assignee of said contract, it dealt in and controlled the shipment of the oils from said Macksburg and vicinity in the same manner and about to the same extent as said defendants had before done. And said plaintiff further says that said defendants, for the purpose of establishing and maintaining a monopoly in themselves of the handling of the oil production of said Macksburg and vicinity, and of getting the oils shipped by them from said latter locality to Marietta for fifteen cents per barrel, and of compelling all other shippers, and especially this plaintiff, to pay as freight on such oil thirty cents per barrel for the same service, and of having paid as tribute to them fifteen cents per barrel of the said thirty cents per barrel paid by such other shippers, without any consideration moving from said defendants to such other shippers therefor, did, in conspiracy and confederation with said Cleveland and Marietta Railroad Company to the ends aforesaid, cause the said contract to be entered into as aforesaid, and became parties thereto, and did also, upon its organization, cause the said Ohio Transit Company to become a party to said contract by assignment, and to enter into said conspiracy and confederation for the purposes aforesaid, and made use of said corporation, the Ohio Transit Company, through their control of the same as its officers, to accomplish the purposes aforesaid." The plaintiff also averred that one half of the amounts charged him for freight on various shipments between January 1, 1884, and February, 1885, had been received by the company for the defendants in pursuance

of the above-mentioned contract, and that the charges were excessive to that extent. In their answer the defendants alleged, among other matters, that as the Ohio Transit Company was a corporation, duly organized under the laws of Ohio, and had acquired all the rights of the defendants by the assignment of the contract, they could not be held liable to the plaintiffs. In regard to this allegation the jury were instructed thus: "If you find by the greater weight of the evidence that the assignment of the contract was a mere form, that the intention of the defendants in organizing this corporation was to make it a mere agency to receive this money, to be distributed to them under the contract and according to their right in it as if there had been no assignment, the mere agent, I say, to hold the money for their benefit, why, then, a payment to the corporation under those circumstances is a payment to them, and the plaintiff would have a right to recover as if it had been put in their hands." The consideration stated in the contract for paying over to the defendants one half of the freight paid by the other shippers was, that the defendants were to construct a system of pipe lines and appurtenances for the collection of the oil produced in the above-mentioned oil fields, and to deliver the same into cars on the line of the Cleveland and Marietta Railroad free of cost to the company.

Nye and Oldham, for the plaintiffs in error.

A. D. Follett, W. B. Loomis, and E. B. Kinkead, for the defendant in error.

By the COURT. 1. That the contract between Brundred and his associates was against public policy, and void, will hardly admit of a question. As said by Baxter, J., in *Handy v. Cleveland etc. R. R. Co.*, 31 Fed. Rep. 689: "Railroads are constructed for the common and equal benefit of all persons wishing to avail themselves of the facilities which they afford. While the legal title thereof is in the corporation of individuals owning them, and to that extent private property, they are, by the law and consent of the owners, dedicated to the public use. . . . Except in the mode of using them, every citizen has the same right to demand the services of railroads, on equal terms, that they have to the use of a public highway, or the government mails." Whatever may have been the financial condition of the railroad company, it was not warranted in making

a contract by which it bound itself to carry for one shipper at half the rate it agreed to charge all others for the same service, in consideration of his agreeing to establish a system of pipe lines to its road; at the same time and for the same consideration, binding itself to charge all others double the amount as a fixed open rate, and to pay to such favored shipper one half of it when collected.

2. It seems equally clear that where, in pursuance of such unlawful agreement, a railroad company has charged and collected certain sums, as freight, of a shipper, ignorant of the agreement, and has paid them over to the other party, the shipper may, on discovering the fraud, maintain an action against such party for money had and received to his use; for the action lies in every instance where one has come into possession of money which should in good conscience be refunded to another.

3. It is claimed that the interposition of the Ohio Transit Company, an incorporation under the laws of Ohio, organized for the purpose of transporting petroleum through tubing and pipes, precludes a recovery against the defendants. If it had, in good faith, been organized for such purpose, there is no doubt but that the receipt of the money by it under the agreement, would constitute a defense to the action against the defendants. If, however, it was organized by the promoters, the defendants, simply for the purpose of consummating the illegal agreement, and shielding themselves from the consequences of receiving the illegal exactions made under it, the act of incorporating can be of no avail to them as a defense. The court fairly submitted this question to the jury, and in finding their verdict for the plaintiff, must have found the facts to be as averred in the petition. It is a stern but just maxim of the law, that fraud vitiates everything into which it enters. Deeds and records made in the most solemn form are set aside and held for naught when shown to have been effectuated for the purpose of fraud; and there is nothing so sacred in a certificate of incorporation as to take it out of the reach of this maxim.

Judgment affirmed.

CARRIERS.—DISCRIMINATION BY: See, generally, note to *Root v. Long Island R. R. Co.*, 11 Am. St. Rep. 647-655; *Avinger v. South Carolina R'y Co.*, 29 S. C. 265; 13 Am. St. Rep. 716; *Cowden v. Pacific Coast Steamship Co.*, 94 Cal. 470; 28 Am. St. Rep. 142; *Cleveland etc. R'y Co. v. Closser*, 126 Ind. 348; 22 Am. St. Rep. 593; *Bayles v. Kansas Pac. R'y Co.*, 13 Col. 181; *Louis*
AM. ST. REP., VOL. XXXIV.—28

ville etc. R. R. Co. v. Wilson, 132 Ind. 517; *State v. Cincinnati etc. R'y Co.*, 47 Ohio St. 130. In *Texas etc. Pac. R'y Co. v. Kateman*, 79 Tex. 465, it was held that article 4257 of the Revised Statutes of Texas, by which a carrier was forbidden to charge more for a less distance than a greater one, does not apply merely to transportation between the same points. Where the commodity shipped for the favored shipper and another is the same, and all is shipped in full carloads and from the same stations, the rule which permits a carrier to discriminate in favor of a shipper who transports large quantities of a given commodity in one parcel at a time, as against a shipper who transports the same commodity in small quantities in broken packages, is not applicable: *Louisville etc. R. R. Co. v. Wilson*, 132 Ind. 517. In *New York etc. R'y Co. v. Gallaher*, 79 Tex. 685, it was said that, to create an unjust discrimination it is not necessary that the quantities carried should be the same, but that they should be like, as in the case of two carloads of lumber. Under a constitution forbidding "undue or unreasonable discrimination," a contract to carry freight for a party at a specific rate, which is less than the published schedule of the carrier, is not void, unless it is shown that such special rate is exclusive: *Bayles v. Kansas Pac. R'y Co.*, 13 Col. 181. A shipper who has been overcharged may recover back the excess: *Louisville etc. R'y Co. v. Wilson*, 132 Ind. 517; and, if a rebate is allowed to certain shippers, a customer may recover an equivalent thereto: *Cook v. Chicago etc. R'y Co.*, 81 Iowa, 551; 25 Am. St. Rep. 512. But one who procures articles to be carried in the name of a favored shipper, who receives a rebate thereon, cannot afterwards recover the amount of the rebate from that shipper, such a transaction being in violation of public policy: *Hawley v. Kansas etc. Coal Co.*, 48 Kan. 502.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

ROB v. DWELLING HOUSE INSURANCE COMPANY.

[149 PENNSYLVANIA STATE, 94.]

INSURANCE — TEMPORARY VACATION OF INSURED PREMISES for four days occurring upon a change of tenants and to suit the convenience of the departing tenant, is not such a cessation of occupancy as will vitiate a policy, providing that it shall be void if the building insured shall "become vacant or unoccupied, or not in use," and provided also that the loss occurred during such vacation.

INSURANCE — FORMAL PROOFS. — IMMEDIATE NOTICE of a total loss given to the insurer, dispenses with further notice or technical proofs of loss.

INSURANCE — WAIVER OF PROOFS OF LOSS. — An absolute denial of liability by an insurer for a total loss after due notice thereof, constitutes a waiver of further or technical proofs of loss.

INSURANCE — PROOF OF NOTICE OF LOSS. — A letter signed by the insurer, addressed and received by his agent in due course of correspondence upon the subject of the policy and loss in dispute, and in reply to a letter giving notice of such loss, when followed by a visit from the person named in the letter as one who would be sent on behalf of the insurer to attend to the loss, is admissible in evidence to show notice thereof and a waiver of further proofs.

ACTION to recover for a total loss under a policy of insurance providing that it should become void if the insured premises "shall be or become vacant or unoccupied or not in use." Judgment for plaintiff, and defendant appealed.

W. W. Watson, C. S. Patterson, and W. S. Diehl, for the appellant.

A. H. McCollum, for the appellee.

GREEN, J. The fire, which was the subject of this action, occurred on the night of March 28, 1890. The house was let to a tenant until April 1st following. The tenant removed

from the building on March 24th, but did not complete the removal of all his goods until the 27th. The plaintiff testified that he had leased the premises to another tenant, to commence from April 1st, and the tenant, Sivers by name, testified that he had leased it for a year from about April 1st. There was no contradiction of any of this testimony, and the learned court below left it to the jury to say whether there was an unreasonable vacancy in the transfer of the tenancy from the outgoing to the incoming tenant, charging that if the vacancy were only reasonable, the condition of the policy on that subject was not broken. We think this action of the court below was entirely correct, and within the line of our decisions in similar cases. The building was a dwelling house, it was leased until April 1st, and it was also leased for another year from that time. The tenant commenced moving on March 24th, and finished on the 27th, leaving an interval of but four days until the new occupancy was to commence. We think this was not the case of an absolute abandonment of the occupancy of the premises, without any new tenancy being provided, as was the fact in *McClure v. Watertown F. Ins. Co.*, 90 Pa. St. 277, 35 Am. Rep. 656. It was rather the temporary vacation of the premises, such as frequently occurs upon the change of tenancy to suit the convenience of the departing tenant. The facts in the case of *Insurance Co. of N. A. v. Hannum*, 1 Mona. 369, and referred to in *Doud v. Citizen's Ins. Co.*, 141 Pa. St. 47, 23 Am. St. Rep. 263, were almost precisely similar to those of the present case. There the outgoing tenant moved out on April 1st, but the incoming tenant, who was to have moved in on the same day, did not, in fact, do so, but had made his arrangements to move in on the 5th. The fire occurred on the 3d. The court below held that this was not such a cessation of occupancy as would vitiate the policy, and we affirmed the judgment. The interval of vacancy there was three days, and here it was four, and that seems to be the only difference between the two cases. We do not think the additional day in the present case at all affects the principle. We do not consider it necessary to repeat the reasoning in the *Doud* case, though it is quite applicable to the facts of this. The interval of vacancy was somewhat shorter, but it was the principle that a vacancy of such a character is not to be regarded as a breach of the condition, which gives the case importance in determining a contention such as the present.

The period of nonoccupancy was but a reasonable vacation, such as is entirely consistent with the good faith of the party, and does not amount to the abandonment of possession which the policy prohibits.

Upon the other chief point of dispute, the case seems to be controlled by our decision in *Pennsylvania F. Ins. Co. v. Dougherty*, 102 Pa. St. 568. Immediate notice of the loss was given by the plaintiff to the defendant, through Mr. D. R. Lathrop, insurance agent, and one of the firm of Lathrop, Gray, and Williams, at Montrose. On April 2, 1890, the defendant wrote to the firm acknowledging receipt of their letter of March 31st, notifying them of the loss under the policy in suit, and saying they would send Mr. Melchert to attend to it. This gentleman called to see the plaintiff about ten days after the fire, and notified the plaintiff that the company was not liable, because the house was not occupied at the time of the fire. The building was a total loss, and under our ruling in the case of *Pennsylvania F. Ins. Co. v. Dougherty*, 102 Pa. St. 568, the company having been notified immediately, no further notice or technical proofs of loss were necessary.

In that case we said: "But beyond this, as the policy embraced a house alone, which was valued at seven hundred dollars; as the loss was total, and as, of that loss the company undoubtedly had full notice, we think, under the authority of the *Lycoming County Mut. Ins. Co. v. Schollenberger*, 44 Pa. St. 259, and the *Farmers' Mut. Ins. Co. v. Moyer*, 10 Week. Not. Cas. 129, no further notice of proofs of loss were necessary. As a rule, the law does not require vain things, and technical proofs could but restate that of which the company was already informed." The same case also decided that "the waiver of the proofs of loss required in a policy may be inferred by any act of the insurer, evincing a recognition of liability, or a denial of obligation exclusively for other reasons." Both of these principles were applicable to the facts of this case, and either of them is sufficient to defeat the defendant's defense.

We see no objection to the admission of the letter of the defendant company to Lathrop, Gray, and Williams. It was received in reply to a previous letter addressed to them by this firm, and, presumably, it was their genuine letter. It had all the marks of authenticity, and it was very easy to prove its want of authority if desired. Being a letter re-

ceived in due course of a correspondence upon the subject of this loss, and this policy, and followed up by a visit from the person named in the letter, as one who was to be sent on behalf of the company, it was certainly for the jury to say whether it was their letter, and whether the person, who called upon the defendant, was their agent. There is no distinct question of an express waiver arising upon the testimony, and a discussion of that subject is not necessary. But the fact that the loss was total, that notice of it was immediately sent to the defendant, that the person who visited the plaintiff was a person of the same name as the one promised to be sent by the defendant in the letter, and that he denied all liability of the defendant on other grounds than the want of technical proofs required by the policy, were sufficient to submit to the jury on the question whether the technical proofs were waived by the acts of the defendant. This question was submitted to the jury by the court below, and as there was no contradictory evidence given by the defendant, the jury naturally found for the plaintiff. We think there was no error in submitting the question to the jury, and we cannot see how they could have found in any other way than they did. The assignments of error are all dismissed.

Judgment affirmed.

INSURANCE. — CONDITIONS AGAINST PREMISES BECOMING "VACANT AND UNOCCUPIED": See extended notes to *Moore v. Phoenix Ins. Co.*, 10 Am. St. Rep. 390; *Cook v. Continental Ins. Co.*, 35 Am. Rep. 443; *Blumer v. Phoenix Ins. Co.*, 33 Am. Rep. 832; and the notes to *Poor v. Humboldt Ins. Co.*, 28 Am. Rep. 230; and *Alexander v. Germania etc. Ins. Co.*, 23 Am. Rep. 79; but see *Continental Ins. Co. v. Kyle*, 124 Ind. 132; 19 Am. St. Rep. 77, and note. Under a policy of insurance on leased premises, which contains a condition against leaving the premises vacant or unoccupied, a reasonable time must be allowed to carry out a change of tenants or occupancy: *Doud v. Citizens' Ins. Co.*, 141 Pa. St. 47; 23 Am. St. Rep. 263, and note; *Cummins v. Agricultural Ins. Co.*, 67 N. Y. 260; 23 Am. Rep. 111, and note. A mere temporary absence of the occupant of a building therefrom will not avoid a policy of insurance conditioned against the premises becoming vacant and unoccupied: *Springfield etc. Ins. Co. v. McLimans*, 28 Neb. 846.

INSURANCE — NOTICE OF LOSS. — Where a policy of fire insurance provides that "in case of loss the assured shall give immediate notice thereof, and shall render to the company a particular account of said loss," an immediate notice of the loss is all that is required: *Killips v. Putnam etc. Ins. Co.*, 28 Wis. 472; 9 Am. Rep. 506. *Contra:* See *American etc. Ins. Co. v. Hathaway*, 43 Kan. 399.

INSURANCE — WAIVER OF PROOFS OF LOSS BY DENIAL OF LIABILITY. — A condition in a policy of fire insurance that in case of loss, the insured must forthwith give written notice thereof to the insurer, is waived, when

the latter, with full knowledge of the loss, denies all liability under the policy without waiting for such written notice: *Savage v. Phoenix Ins. Co.*, 12 Mont. 458; 33 Am. St. Rep. 591; *Phoenix Ins. Co. v. Bachelder*, 22 Neb. 490; 29 Am. St. Rep. 443, and note.

INSURANCE — NOTICE OF LOSS. — Proof that the adjuster of an insurance company was sent to the place of the fire, under instructions from his company, and that he was there one week after the fire, is conclusive evidence of notice to the company of the loss: *Welsh v. London Ass. Corp.*, 151 Pa. St. 607; 31 Am. St. Rep. 786, and note; and to the same effect see *Graves v. Merchants' etc. Ins. Co.*, 82 Iowa, 637; 31 Am. St. Rep. 507, and note.

PETERS v. GRIM.

[149 PENNSYLVANIA STATE, 103.]

WAGERING CONTRACTS — PURCHASE ON MARGIN — DELIVERY. — A purchase of stock merely on margin for speculation is not necessarily a gambling transaction. If there is not, under any circumstances, to be a delivery as part of and completing the purchase, then the transaction is a mere wager on the rise and fall of prices; but if there is in good faith a purchase, the delivery may be postponed, or made to depend upon a future condition, and the stock carried on margin, or otherwise in the meantime, without affecting the legality of the operation.

WAGERING CONTRACTS — DEPOSIT WITH BROKER WHEN MAY BE RECOVERED. — When a gambling transaction in stocks is closed between the principal and his broker, the account rendered and settled, and the entire profit paid over, leaving in the broker's hands only the original deposit recognized by both parties as the principal's money in the broker's hands in contemplation of new transactions, the principal may recover the amount of such deposit from the broker before he enters into further transactions and he cannot set up the illegal character of the former transaction in defense.

ASSUMPSIT. Plaintiff Peters through defendant Grim, a stockbroker, bought and sold stocks. The profit of these transactions was paid to plaintiff and after such transactions were closed and the profits paid, the defendant retained in his hands the sum of five hundred dollars originally deposited with him as security by plaintiff, which this action was brought to recover. Plaintiff suffered a nonsuit and appealed.

D. D. Roper and C. J. Erdman, for the appellant.

Edward Harvey, for the appellee.

MITCHELL, J. A purchase of stock for speculation, even when done merely on margin, is not necessarily a gambling transaction. If one buys stock from A, and borrows the

money from B to pay for it, there is no element of gambling in the operation, though he pledge the stock with B as security for the money. So if instead of borrowing the money from B, a third person, he borrows it from A, or in the language of brokers, procures A to "carry" the stock for him, with or without margin, the transaction is not necessarily different in character. But in this latter case, there being no transfer or delivery of the stock, the doubt arises whether the parties intended there should ever be a purchase or delivery at all. Here is the dividing line. If there was not under any circumstances to be a delivery as part of and completing a purchase, then the transaction was a mere wager on the rise and fall of prices; but if there was in good faith a purchase, then the delivery might be postponed or made to depend on a future condition, and the stock carried on margin or otherwise in the meanwhile, without affecting the legality of the operation. Peters testified that he bought and sold the stock; that it was kept protected by him; that is he paid up at all times whatever margin was necessary to make it a sufficient security in the broker's hands for the latter's advance of money; that the stock was at all times held subject to his order, and that when it reached a "bottom price" he was to pay up the full amount and take up the stock absolutely. On this evidence plaintiff was entitled to go to the jury, and if they believed this was a fair and accurate account of the transaction, as the parties really intended it, they would be justified in finding it lawful.

But this question is not really material in the present case. Whatever the character of the transactions, they were closed and done. When the last sale was made by Peters's order a profit was made, an account rendered, and the entire profit paid over, leaving in defendant's hands only the amount of the original deposit, which was recognized by both parties as plaintiff's money, held as such by defendant subject to plaintiff's order, on the expectation, to be sure, that it would be used again in similar transactions, but with no authority in defendant or anybody else to use it in that or any other way without plaintiff's direction. Peters was asked on cross-examination: "When the stock was sold you left the five hundred dollars with him to be invested again in the same sort of transaction? A. Yes, provided I felt like investing; it was in his hands subject to my call. Q. That is, you could either authorize it to be invested or call the money back? A. Yes."

In the business view of the witness this was a new start, and the legal view is the same. If when the first deposit was made by plaintiff with directions to buy the stock he had countermanded the directions before anything was done under them, it could not be pretended that defendant could have retained the money on the ground of illegality in the contemplated transaction. Intent as to a future act does not make illegality. There is always a *locus penitentiae*, and just as much in regard to a second act as to a first, if the second is distinct and separate. Even, therefore, if it be conceded that the transactions of plaintiff and defendant were gambling, they were over and settled; the money that was in defendant's hands was there not as profits, but as a new deposit of plaintiff's money in contemplation of new transactions, as to which plaintiff changed his mind, as he was entitled to do, and which therefore never took place. The money was and remained his, and the evidence so far in the case shows no reason why he should not have it back.

No precise precedent has been found for the present state of facts, but the principles upon which it is to be determined are perfectly plain, and are moreover in entire accord with the law heretofore declared in *Swan v. Scott*, 11 Serg. & R. 155; *Lestapies v. Ingraham*, 5 Pa. St. 71; and *Fox v. Cash*, 11 Pa. St. 207. The distinction which later cases have so fully developed between the application of the maxim, *Nemo allegans turpitudinem suam audiendus est*, to cases of private fraud between the parties and cases of acts made illegal by statute or by public policy (see *Bredin's Appeal*, 92 Pa. St. 241, 37 Am. Rep. 677) does not affect the present controversy. In dealing with stock transactions falling within or in any way connected with wagering contracts, the law of Pennsylvania is of exceptional, and for myself I would say of illogical and untenable, severity in its interference with the business contracts of parties *sui juris*, and entirely competent to manage their own affairs. But even in this class of cases the decisions have only gone so far as to sustain the opening of the whole transaction, after it has nominally closed where the demand is for a part of the actual gains or losses of the illegal acts: See *Brua's Appeal*, 55 Pa. St. 294; *North v. Phillips*, 89 Pa. St. 250; *Dickson v. Thomas*, 97 Pa. St. 278; *Griffiths v. Sears*, 112 Pa. St. 523. Even *Fareira v. Gabell*, 89 Pa. St. 89, and *Ruchizky v. De Haven*, 97 Pa. St. 202, two extreme cases of which it is justly said by Mr. Biddle in his

Law of Stock Brokers, page 308, that they are "opposed in principle to all the decisions, both of the English courts and of every court of every state in the Union," were decided upon the ground that the cause of action was loss in the illegal transactions. Gains in the same transactions would undoubtedly stand upon the same footing, but it must be said to the honor of a class of business men often harshly criticized that cases of refusal by a broker to pay over profits to his customer are of the rarest occurrence.

As already said, there must be a time when the transactions are closed and their illegal character no longer attaches. It was reached in the present case, if the illegality ever existed, when the parties settled the account and defendant paid over the profits, leaving nothing in his hands but a deposit of plaintiff's money for further operations. Such future operations were dependent on plaintiff's will, and when he changed his mind and determined not to enter upon them, he was entitled to have his money back.

Judgment reversed and *procedendo* awarded.

In the case of *Repplier v. Jacobs*, 149 Pa. St. 167, the plaintiff had deposited with the defendant, a broker, the sum of fifteen hundred dollars, as a margin to cover possible losses in dealings in railroad bonds to the amount of fifteen thousand dollars. Defendant became embarrassed, and his holdings, including plaintiff's bonds, were sold, showing a profit of three hundred forty-four dollars and twenty-seven cents, which amount defendant paid plaintiff, and assigned him an equity of fifteen hundred dollars in a mortgage as collateral security for the fifteen hundred dollars deposited. Plaintiff realized three hundred seventy-five dollars and seventy-seven cents on the sale of the mortgaged premises, and brought suit for the balance of the fifteen thousand dollars originally deposited. Defendant recovered a judgment in the court below, but the appellate court held, following the principal case, that though the first transaction was a wagering contract, the fact still remained that it had been closed and settled, and the profit paid over; that the money thereafter remaining in the defendant's hands was only the original deposit made by plaintiff, and recognized by both parties as such, and that the plaintiff was entitled to recover the amount thereof from the defendant, whether represented by the identical coin originally deposited or not.

CONTRACTS — MARGINS. — For discussion of the validity of contracts for the purchase of stocks or produce, where no delivery is contemplated, see *Lester v. Buel*, 49 Ohio St. 240, *ante*, p. 556, and note. The sale of goods to be delivered in the future is valid, though there is an option as to the time of delivery, and the seller has no means of getting them but to go into the market and buy; but if no delivery of the goods is intended, and it is a mere speculation on the rise and fall of prices, the contract will be void: *Crawford v. Spencer*, 92 Mo. 498; 1 Am. St. Rep. 745, and extended note; *Conner v. Robertson*, 37 La. Ann. 814; 55 Am. Rep. 521; note to *Sondheim v. C. Hart*, 10 Am. St. Rep. 33.

WAGERING CONTRACTS — DEPOSIT WITH BROKER — RECOVERY. — Money put in the hands of a broker to purchase futures in grain for the principal may be recovered when no part of such money consists of profits made by the agent for the principal out of the illegal venture: *Clarks v. Brown*, 77 Ga. 606; 4 Am. St. Rep. 98, and note.

HERR v. CITY OF LEBANON.

[149 PENNSYLVANIA STATE, 222.]

NEGLIGENCE — PROXIMATE CAUSE — ACCIDENT IN HIGHWAY. — If in the ordinary use of a street one is crowded over the edge thereof and injured by the volume of travel, the sudden shying of his horse, or by reason of an accumulation of ice upon the roadway, the negligence of the city in failing to erect and maintain a barrier on the edge of the street will justify a recovery, if the plaintiff is not guilty of contributory negligence.

NEGLIGENCE — PROXIMATE CAUSE — ACCIDENT IN HIGHWAY. — Although a city may be negligent in failing to maintain a barrier on the edge of a street, yet when a horse drawing an omnibus in the middle thereof, which is twenty feet wide and in good condition, falls from choking or inability to draw the vehicle, and in his struggles to regain his feet plunges over the edge of the street, dragging the omnibus with him, and injuring a person therein, such person cannot recover of the city, for the reason that the absence of the barrier is only the remote cause of the accident, while the fall of the horse is the proximate or efficient cause thereof.

HIGHWAYS — DUTY OF ROAD OFFICERS IS TO PROVIDE ROADS suitable for ordinary travel, conducted in an ordinary manner, and such safeguards as may be needed to meet the risks of such travel, but they are not bound to provide against extraordinary incidents or accidents of travel.

NEGLIGENCE — CONCURRENT, PROXIMATE, AND REMOTE CAUSES. — When two distinct causes are operating at the same time to produce a given result which might be produced by either, they are concurrent causes; but if two distinct causes are successive and unrelated in their operation, they cannot be concurrent. One of them must be the proximate and the other the remote cause, and the law will regard the proximate as the efficient and responsible cause, disregarding the remote cause.

HIGHWAYS — DUTY TO KEEP IN REPAIR — NEGLIGENCE — PROXIMATE AND REMOTE CAUSE. — A highway that is in suitable condition for ordinary travel, conducted in an ordinary manner, does not become defective because some extraordinary unforeseen condition arises, in consequence of which it is momentarily too rough or too narrow to meet all exigencies of the situation. Whatever is so much out of the ordinary course as not to be naturally foreseen as a probable result of the condition of the highway, the road officers are not bound to provide against, and their neglect to make such provision can be neither a proximate nor a concurrent cause of the injury received in consequence of such extraordinary event or accident.

W. M. Derr and Frank E. Meily, for the appellant.

Grant Werdman and Luther F. Hock, for the appellee.

WILLIAMS, J. The plaintiff was injured by an accident happening on one of the streets of the city of Lebanon. She seeks by this action to hold the city responsible for the consequences of the accident on the ground that the proximate cause of her injury was the negligence of the city. The circumstances are told by the driver of the omnibus in which she was a passenger, and whom she called as a witness for that purpose. He says that there were four adults besides himself in and upon the omnibus, five children, and some household goods, including a sewing machine. It was drawn by one horse. The route passed up and along the side of a hill. On the upper side of the street was a high bank. On the lower side, a steep descent of several feet. There was no guard rail along the edge of the declivity. The driver describes the street as smooth, hard, twenty feet wide, and "well piked." While ascending the hill in the middle of the roadway, the horse suddenly fell. It struggled to regain its feet, but failed. Whether the weight of the load in connection with the grade of the hill was too much for the strength of the horse, or the horse was choked by the harness, or taken suddenly ill, no one ventures an opinion. It continued struggling until it had moved from the middle of the street to the outer edge, and then over the declivity, dragging the omnibus and its load after it. The driver was asked the question, What caused the horse to fall? He replied: "I don't know." He was then asked if the fall was not due to the fact that the horse was choked. His answer was: "I could not say." To the further question, whether he could have driven safely over the road if the horse had not fallen, he said: "Yes, sir; the road was all right, but I did not have any control over him [the horse] after he was down." The jury passed upon the same question. The learned judge requested the jury to answer, with their verdict, two written questions, viz.: Was the city negligent in not erecting a barrier at the edge of the highway? and was the fall of the horse caused by the negligence of the city? They answered the first question, "Yes"; the second, "No." Let us accept these answers, as we should do, as correctly disposing of both questions, and as settling the fact that the city was guilty of negligence in failing to erect a barrier. It then follows that for any injury suffered by reason of the absence of the barrier, of which such absence was a proximate or efficient cause, the city would be liable. If, therefore, in the ordinary

use of the street, one had been crowded over the bank by the volume of the travel, by the sudden shying of his horse, or by reason of an accumulation of ice upon the roadway, the absence of the barrier might justify a recovery, if the plaintiff was not guilty of contributory negligence, and so in part the author of his own misfortune. Such accidents may be said to be a probable result of the neglect complained of. If so, the city was bound to anticipate and provide against them, and its failure to do so was negligence. But the liability so incurred does not extend to all sorts of accidents upon that street, only to those of which the negligence may be the proximate cause. The proximate cause of this action was the fall of the horse and its inability to recover. This fall was not due to the negligence of the city, for the jury have so found the fact in their answer to the questions submitted to them. When the horse fell, it was near the middle of the roadway, smooth, hard, "well piked," and twenty feet wide. In its struggles to get upon its feet, the driver says he could not control it. Each time that it got partly up, it fell again. It fell on the same side, and each time nearer to the edge of the bank, until at length it plunged headlong over the edge. These facts bring the case squarely within the doctrine of *Chartiers Tp. v. Phillips*, 122 Pa. St. 601. Indeed, they make a stronger case for the defendant than was made in that case. The horse went over, not in the ordinary use of the street, but because of its own inability to manage its load. It fell, and it could not get up. Such an accident is not one of the ordinary incidents or accidents of travel which the city ought to foresee and provide against. The duty of road officers is to provide roads suitable for ordinary travel, conducted in the ordinary manner, and to provide such safeguards as may be needed to meet the risks of such travel: *Hey v. Philadelphia*, 81 Pa. St. 44; 22 Am. Rep. 733; *Jackson Tp. v. Wagner*, 127 Pa. St. 184; 14 Am. St. Rep. 883. This is the extent of their liability in this state. The same rule is held in many other states: *Warner v. Holyoke*, 112 Mass. 362; *Chapman v. Cook*, 10 R. I. 304; 14 Am. Rep. 686; *Keyes v. Marcellus*, 50 Mich. 439; 45 Am. Rep. 52; *Davis v. Hill*, 41 N. H. 329. The learned judge stated the general rule to the jury correctly, but he seemed to be of opinion that the neglect of the city to erect a barrier, and the failure and struggles of the horse, might be regarded as concurring causes of the accident, and the city might be required to pay for its results on

that theory. This was a mistake. If two distinct causes are operating at the same time to produce a given result, which might be produced by either, they are concurrent causes. They run together, as the word signifies, to the same end. But if two distinct causes are successive and unrelated in their operation, they cannot be concurring. One of them must then be the proximate and the other the remote cause. When they stand in this relation to each other, and the result to be considered, the law regards the proximate as the efficient and responsible cause, and disregards the remote.

To determine the relation which the failure of the horse in this case bears to the negligence of the city, we must remember that the jury has found that they bear no relation to each other; for they said, in answer to the question of the court, that the failure of the horse was not chargeable to the negligence of the city. It is therefore an independent unrelated cause, without which the accident would not have happened. It was the first, or proximate, cause in the series; the efficient and responsible cause.

The absence of the barrier was the remote cause. It did not bring about, or help bring about the accident, although it made its consequence more serious. It is probable that our failure to notice the assertion of the same doctrine by the court below in *Wagner v. Jackson Tp.*, 133 Pa. St. 61, when it was last here, that we are now considering, may be responsible for its introduction into this case. On the argument of that case upon the first appeal, the important question presented was over the duties of road officers. When it came up again, the learned judge seemed to have followed, in his answers to the points, the rule that had been laid down by us, and the error assigned to the general charge escaped attention. In the general charge the same error was committed that appears in this case. The jury was substantially told that the township was not bound to anticipate or provide against such accidents as befell Mrs. Wagner in the fright of her horse and the crushing of her wheels, yet if they failed to anticipate and provide against them they were guilty of concurring negligence, and liable to respond in damages for the loss sustained. This illogical application of the rule relating to concurring negligence escaped attention. In so far as that subject is concerned, the case, as reported in *Wagner v. Jackson Tp.*, 133 Pa. St. 61, is not authority, and cannot be followed.

A road that is in suitable condition for ordinary travel, con-

ducted in the ordinary manner, does not become defective because some extraordinary condition, not foreseen, arises in consequence of which it is, for the moment, too rough or too narrow to meet all the exigencies of the situation. Whatever is so much out of the ordinary course as not to be naturally foreseen as a probable result of the condition of the highway, the road authorities are not bound to provide against; and their neglect to make such provision can be neither a proximate nor a concurring cause of the injury received in consequence of such extraordinary happening.

If the road in Jackson township was suitable and safe for ordinary travel, a traveler could ask no more. If, notwithstanding the condition of the road, a traveler was injured as the result of a series of accidents like those that befell Mrs. Wagner, and for which it is conceded the township was not responsible, viz., the fright of her horse, his sudden turn in the road, the crushing of the wagon wheel, the dragging of the axle, and the consequent pulling of the wagon out of the track and against the stone piles, it is clear that the stone piles, which did not interfere with ordinary travel on the common beaten wagon track, were not the proximate or a concurrent cause of the injury, and that the question of concurring negligence was not properly in that case.

The judgment in this case is reversed.

MUNICIPAL CORPORATIONS — HIGHWAYS — PROXIMATE CAUSE. — To render a municipal corporation liable for injury caused by defects in a public highway, such defect must have been the sole efficient cause of the injury: *Schaeffer v. Jackson Tp.*, 150 Pa. St. 145; 30 Am. St. Rep. 792, and note with cases collected discussing the liability of a municipal corporation for injuries caused by defective highways concurring with other causes, such as frightened horses: *Pratt v. Inhabitants of Weymouth*, 147 Mass. 245; 9 Am. St. Rep. 691, and note. But in *Gonzales v. Galveston*, 84 Tex. 3, 31 Am. St. Rep. 17, it was held that the negligence of a city in failing to remove a lumber pile from a street, though there is a concurring negligent act of a drayman, causing an injury, will not relieve the city from its negligence, and see also the note to this case.

MUNICIPAL CORPORATION — DUTIES IN RESPECT TO HIGHWAYS. — A township is not bound to do more than to so construct its bridges and highways as to protect the public against injury by a reasonable, proper, and probable use thereof, in view of the surrounding circumstances, such as the extent, kind, and nature of the travel and business over them: *Commonwealth v. Allen*, 148 Pa. St. 358; 33 Am. St. Rep. 830; *Horstick v. Dunkle*, 145 Pa. St. 220; 27 Am. St. Rep. 685; *Township of Jackson v. Wagner*, 127 Pa. St. 184; 14 Am. St. 833, and note with cases collected.

SPALDING v. EWING.

[140 PENNSYLVANIA STATE, 375.]

CONTRACTS TO PROCURE LEGISLATION. — Contracts which have for their subject-matter any undue interference with the creation of laws, or their due enforcement, are against public policy and void.

CONTRACTS TO PROCURE LEGISLATION — FEE CONTINGENT ON SUCCESS. — An attorney may recover compensation for purely professional services performed in procuring legislation in which his client is interested; but when the agreement between attorney and client provides for compensation contingent on the amount recovered under such legislation when procured by the attorney, the contract is against public policy and cannot be enforced.

LOBBYING CONTRACTS — CONTINGENT COMPENSATION. — A contract to give an attorney or other person a certain percentage of a claim against the United States government for services in collecting it, is void as against public policy, when such services consist in procuring legislation compelling the payment of the claim.

Charles H. Pennypacker, for the appellant.

William M. Hayes, for the appellee.

STERRETT, J. This action, to recover fees alleged to have been earned by plaintiff, is founded on the following contract signed by defendant:—

“LANDENBERG, Pa., 1882. I here guarantee that myself, claimant for additional pay as postmaster (at Chandlersville, Landenberg), shall, without delay, upon the receipt of draft for amount which may be collected, remit the amount of fee due his attorney, Henry Spalding, which is understood to be twenty-five per cent of collection, to the said Henry Spalding, at Washington, D. C.”

The character of the services rendered in pursuance of, and doubtless contemplated by this contract, will be best understood by referring to plaintiff's deposition, given in evidence on the trial. After stating that the power of attorney from defendant was procured by a person employed “to obtain powers of attorney in such cases,” and that the postmaster-general had “for years resisted the payment of defendant's claim,” etc., the plaintiff testifies as follows: “I applied to Congress for a legislative mandate to compel the postmaster-general to make the necessary readjustments of defendant's salary and the salary of other postmasters, and this application was resisted by the postmaster-general. From session to session of Congress, I made application to committees having jurisdiction, urging the enactment of the mandate applied for

and, after several years' labor in that behalf I obtained the enactment by Congress, on March 3, 1883, of the mandate applied for, which act is known as the Spalding act, by reason of my services in that behalf. Afterwards, the postmaster-general tried to avoid complying with this mandate, and I carried on proceedings which compelled him ultimately, in a degree, to comply with the law I also made arguments on his behalf before the different committees, when, in 1886, the appropriation to pay the first allowance was stricken out of the appropriation bill in the House of Representatives, and I saw the necessary report was made to Congress of the second allowance, and I took the necessary means to have the appropriations made. The defendant's claim was always resisted by the officers of the post-office department, and, by the most laborious and protracted service on behalf of the defendant, I compelled the payment of the said claims, notwithstanding such resistance."

In his answer to the fifth interrogatory, after again speaking of his long-continued service, the plaintiff says: "It was never possible to collect either of these claims without my said service, for the officers of the post-office department, at every stage of the case, down almost to the time of collection, resisted the payment of the claims."

In answering the sixth interrogatory, he further testifies: "That after he had expended time and money for the defendant, and compelled the payment of a claim not otherwise collectible, the defendant has, by a variety of misrepresentations, tried to cheat witness out of his fees."

Plaintiff's son testified, among other things, that his father, "as attorney for Ewing and many others, did secure for them the allowance previously denied, and which, without his aid, they never would or could have secured."

It thus appears by the depositions above referred to that defendant's claim, and many similar claims against the post-office department, had been considered and rejected. As testified by plaintiff, "the postmaster-general for years resisted defendant's claim."

The burden of plaintiff's undertaking appears to have been the procurement of what he terms a "legislative mandate," the avowed object of which was to compel recognition of the claims rejected and so long resisted by the post-office department. It is very evident, from the uncontradicted testimony of plaintiff and his son, that strictly professional service, such

as preparing petition to Congress, drafting the necessary bill, furnishing such statement and proofs of said claims as were necessary to a proper understanding of their merits, etc., must have constituted a very insignificant part of the "several years' labor," "the most laborious and protracted services," the numerous "applications to committees," "from session to session of Congress," etc., testified to by him. According to his own account of it, the work of engineering the bill through Congress, despite the strong and determined opposition of the post-office department, must have been multiform, persistent, and so conspicuously effective, that plaintiff was honored with the paternity of the "legislative mandate" by calling it the "Spalding Act." The plaintiff's evidence is not susceptible of any other inference than that, in the main, the services contemplated by the contract in suit, and actually rendered in pursuance thereof, were such as have been repeatedly pronounced contrary to public policy. In *Clippinger v. Hepbaugh*, 5 Watts & S. 315, 40 Am. Dec. 519, the condition of the obligation to pay one hundred dollars was that the obligee should succeed in procuring from the legislature the passage of a law authorizing the obligor and his wife to sell and convey certain real estate devised to the latter and her children. In refusing to sustain the contract, this court said: "It is not necessary to say that a certain compensation for such services may not be recovered; but we are clearly of opinion that it would be against sound policy to sanction a practice which may lead to secret, improper, and corrupt tampering with legislative action. It is not required that it tends to corruption; if its effect is to mislead, it is decisive against the claim, and that such is its tendency, no human being can reasonably doubt. . . . The law will not aid in enforcing any contract that is illegal, or the consideration of which is inconsistent with public policy and sound morality, or the integrity of the domestic, civil, or political institutions of a state. . . . It matters not that nothing improper was done, or was expected to be done by the plaintiff. It is enough that such is the tendency of the contract, that it is contrary to sound morality and public policy, leading, necessarily, in the hands of designing and corrupt men, to improper tampering with members, and the use of an extraneous, secret influence, over an important branch of the government. It may not corrupt all; but if it corrupts or tends to corrupt some, or if it deceives or tends to deceive or

mislead some, that is sufficient to stamp its character with the seal of reprobation before a judicial tribunal."

The same general principle is recognized in the following cases: *Hatzfeld v. Gulden*, 7 Watts, 152; 32 Am. Dec. 750; *Bowman v. Coffroth*, 59 Pa. 19; *Ormerod v. Dearman*, 100 Pa. St. 561; 45 Am. Rep. 391. In the last case, the present chief justice, referring to the authorities, said: "They establish the principle that contracts, which have for their subject-matter any interference with the creation of laws, or their due enforcement, are against public policy, and therefore void."

In *Trist v. Child*, 21 Wall. 441, the validity of a contract to procure the enactment of a law, authorizing the payment of a private claim, was fully considered by the supreme court of the United States. After referring to *Clippinger v. Hepbaugh*, 5 Watts & S. 315, 40 Am. Dec. 519, and three other American cases, viz.: *Harris v. Roof's Ex'r*, 10 Barb. 489; *Rose v. Truax*, 21 Barb. 861; *Marshall v. Baltimore etc. R. R. Co.*, 16 How. 314; in all of which such contracts were held to be against public policy, that court said: "We entertain no doubt that in such cases, as under all other circumstances, an agreement, express or implied, for purely professional services, is valid. Within this category are included, drafting the petition to set forth the claim, attending to the taking of testimony, collecting facts, preparing arguments, and submitting them, orally or in writing, to a committee or other proper authority, and other services of like character. All these things are intended to reach only the reason of those sought to be influenced. They rest on the same principle of ethics as professional services rendered in a court of justice, and are no more exceptionable. But such services are separated by a broad line of demarcation from personal solicitation, and other means and appliances, such as the correspondence shows were resorted to in this case. There is no reason to believe that they involved anything corrupt or different from what is usually practiced by all paid lobbyists in the prosecution of their business."

After showing that the prohibition against contracts to procure either general or private legislation rests upon a solid foundation, the court further says: "To legalize the traffic of such services would open a door at which fraud and falsehood would not fail to enter and make themselves felt at every accessible point. It would invite their presence and offer them a premium. If the tempted agent be corrupt himself, and

disposed to corrupt others, the transition requires but a single step. He has the means in his hands, with every facility and a strong incentive to use them. The widespread suspicion that prevails, and charges openly made, and hardly denied, lead to the conclusion that such events are not of rare occurrence. Where the avarice of the agent is inflamed by the hope of a reward contingent upon success, and to be graduated by a percentage upon the amount appropriated, the danger of tampering in its worst form is greatly increased. It is by reason of these things that the law is as it is upon the subject. It will not allow either party to be led into temptation where the thing to be guarded against is so deleterious to private morals, and so injurious to the public welfare."

"We have said that for professional services in this connection a just compensation may be recovered. But, where they are blended and confused with those that are forbidden, the whole is a unit and indivisible. That which is bad destroys that which is good, and they perish together. Services of the latter character, gratuitously rendered, are not unlawful. The absence of motive to wrong is the foundation of the sanction. The tendency to mischief, if not wanting, is greatly lessened. The taint lies in the stipulation for pay. Where that exists, it affects fatally, in all its parts, the entire body of the contract."

The principle under consideration is not restricted to contracts involving the procurement of legislation for a contingent compensation. It has been frequently recognized and applied in other transactions involving questions of public policy. Some of the instructive cases in which that has been done are the following: *Tool Co. v. Norris*, 2 Wall. 48, 56; *Oscanyan v. Arms Co.*, 103 U. S. 261; *Woodstock Iron Co. v. Richmond etc. Extension Co.* 129 U. S. 643. In the first of these, an agreement, for compensation, to procure a contract from the government to furnish its supplies, was held to be against public policy, and could not be enforced. Mr. Justice Field, delivering the opinion of the court in that case, said: "The principle which determines the invalidity of the agreement in question has been asserted in a great variety of cases. It has been asserted in cases relating to agreements for compensation to procure legislation. These have been uniformly declared invalid, and the decisions have not turned upon the question whether improper influences were contemplated or used, but upon the corrupting tendency of the

agreements. . . . Agreements for compensation contingent upon success, suggest the use of sinister and corrupt means for the accomplishment of the end desired. The law meets the suggestion of evil, and strikes down the contract from its inception."

As has been seen by reference to plaintiff's testimony, the contract in suit contemplated the procurement of the "legislative mandate," compelling the post-office department to recognize certain claims which had theretofore been considered and rejected. The procurement of that legislation was the burden of plaintiff's undertaking. He has explained the difficulties encountered in accomplishing it, as well as the reasons therefor. The undisputed facts of the case bring it within the principle recognized in the authorities above cited, and defendant's second point should have been affirmed.

Judgment reversed.

CONTRACTS TO PROCURE LEGISLATION — INVALIDITY. — An agreement to render services as a lobby agent, or to exert personal influence and solicitations to procure the passage of a public or private law by the legislature, is void, as being in contravention of public policy: *Powers v. Skinner*, 34 Vt. 274; 80 Am. Dec. 677, and note; *Sweeney v. McLeod*, 15 Or. 330; *Bryan v. Reynolds*, 5 Wis. 200; 68 Am. Dec. 55, and note; *Mills v. Mills*, 40 N. Y. 543; 100 Am. Dec. 535, and note; note to *Bowman v. Phillips*, 13 Am. St. Rep. 298; extended note to *Parsons v. Trask*, 66 Am. Dec. 506; notes to *Lyon v. Mitchell*, 93 Am. Dec. 510; *Boyd v. Barclay*, 34 Am. Dec. 766. A contract for contingent compensation for obtaining an act of the legislature, is void: *Gill v. Williams*, 12 La. Ann. 219; 68 Am. Dec. 767, and note; *Coquillard v. Beares*, 21 Ind. 479; 83 Am. Dec. 362. An agreement to pay a delegate in Congress for services rendered by him in securing the payment of a claim where legislation is by Congress required therefor, is void: *Weed v. Black*, 2 McAr. 268; 29 Am. Rep. 618. So an agreement to grant certain privileges in consideration of the withdrawal of opposition to the passage of an act of the legislature, is void: *Pingry v. Washburn*, 1 Aikens, 264; 15 Am. Dec. 676; but see *Miles v. Thorne*, 38 Cal. 335; 99 Am. Dec. 386, and note.

MEIXELL v. MORGAN.

[140 PENNSYLVANIA STATE, 415.]

WATERS — DRAINAGE — DOMINANT AND SERVIENT ESTATES. — An upper proprietor has a right, by means of underground and artificial drains, to collect surface water on his land, and discharge it upon the land of the lower proprietor at a single point which is the natural water shed of both tracts, and at which there is an open ditch on the lower land; although a larger quantity of water is thus discharged at that point than would naturally flow there by surface drainage, provided that in so doing, care is taken not to cause unnecessary injury to the owner of the lower land.

WATERS — DRAINAGE — RIPARIAN RIGHTS. — An upper owner may drain his ground of surface water, and discharge it according to its natural channel, may cover up and conceal the drains through his lands, may use running streams to irrigate his fields, though he thereby diminishes, not measurably, the supply of his neighbor below, and may clear out impediments in the natural channel of his streams, though the flow of water on his neighbor's land is thereby increased.

J. M. Linn, for the appellant.

Andrew A. Leiser, for the appellee.

PAXSON, C. J. This was an action of trespass by the owner of the servient tenement against the owner of the dominant, to recover damages for collecting all the waters which would pass from the dominant to the servient, to one spot, by artificial underdrains, and discharging them there.

Upon the trial below, the court was requested by the plaintiff's second and fifth points, to instruct the jury that if they believe that underdrains were made and concentrated to one point, that said underdrains discharged a larger quantity of water at that point than by surface discharge would naturally flow. the plaintiff is entitled to recover; and that it makes no difference in such case whether there was a ditch at that point of the discharge or not.

The court refused these points, and for further answer referred to the answer to plaintiff's first point.

It is therefore necessary to examine the first point, and the answer thereto, in order to ascertain whether the jury were properly instructed.

The first point is as follows: "That while the Meixell land is bound to receive all the surface water from Morgan's land, which would naturally go that way by the inclination of the land, and all the water that may be led by superficial cultivation, that a different principle obtains in cases of artificial,

concealed, or mole drains; that Morgan cannot concentrate all the water by underground drains and discharge them at one point.

“Answer: Refused as put. The defendant had a right to lay an artificial drain on his land to carry off the ordinary rainfall and discharge the water at one point, if the jury find that point was the natural watershed for both tracts of land, and further find that there was an open ditch on the plaintiff's land into which the waters from the defendant's land naturally descended, and further find that the water from the drains did not materially increase the flow of water upon the defendant's land and work injury to him. If the point of discharge of the defendant's drains was not the natural outlet for the water from the defendant's land over that of the plaintiff, and there was no ditch at the point of discharge on the plaintiff's land to receive and carry off the water, and the defendant collected the water on his own land by underdrains, and discharged it on the plaintiff's land in greater volume than it would naturally flow there, and thereby injured the plaintiff, then we affirm the point, and plaintiff can recover.”

This ruling was as favorable to the plaintiff as he had any right to expect. It is settled law that, “for the sake of agriculture, a man may drain his ground which is too moist, and discharging the water according to its natural channel, may cover up and conceal the drains through his lands; may use running streams to irrigate his fields, though he thereby diminishes, not unreasonably, the supply of his neighbor below; and may clear out impediments in the natural channel of his streams, though the flow of water on his neighbor's land be thereby increased”: *Kauffman v. Griesemer*, 26 Pa. St. 407; 67 Am. Dec. 437; *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126; 57 Am. Rep. 445.

If it were the law, that under no circumstances could the flow of water from the dominant to the servient tenement be increased, it would seriously interfere with agricultural and mining operations. The very act of draining land necessarily increases the flow of water, whether such drainage is caused by open ditches or underground tiles. In doing so, however, care must be taken not to cause unnecessary injury to the owner of the servient tenement. The water must not be diverted from its natural channel by the opening of new or different channels.

Judgment affirmed.

SURFACE WATERS — RIGHT TO DISCHARGE ON LAND OF ADJACENT OWNER. It is not true that a land owner may lawfully collect surface water into an artificial channel and pour it on the land of another: *Patoka Tp. v. Hopkins*, 131 Ind. 142; 31 Am. St. Rep. 417, and note; *Yerex v. Kineder*, 86 Mich. 24; 24 Am. St. Rep. 113, and note; *Rhoads v. Davidheister*, 133 Pa. St. 226; 19 Am. St. Rep. 630, and note; *Gregory v. Bush*, 64 Mich. 37; 3 Am. St. Rep. 796, and note; but the owner of a dominant estate may drain the water falling upon his land, by means of underground tiles, into a natural drainage channel upon his land, through which it is cast upon the lower or servient estate: *Vannest v. Fleming*, 79 Iowa, 638; 18 Am. St. Rep. 387, and note. See extended note to *Martin v. Jett*, 32 Am. Dec. 123, on the servitude to receive the flow of water; also notes to *Rychlik v. St. Louis*, 14 Am. St. Rep. 654; *Boynton v. Longley*, 3 Am. St. Rep. 787; and *Rowe v. St. Paul etc. R'y Co.*, 16 Am. St. Rep. 710.

KRUG v. ST. MARY'S BOROUGH.

[152 PENNSYLVANIA STATE, 30.]

MUNICIPAL CORPORATIONS — LIABILITY FOR NEGLIGENCE. — A municipal corporation must respond in damages for its negligence in the construction or repair of public works when special injury results to a private person therefrom.

MUNICIPAL CORPORATIONS — LIABILITY FOR NEGLIGENCE — CONSTRUCTION OF BRIDGE. — When a municipal corporation is guilty of negligence in so constructing a bridge that it is an obstruction to the flow of water in times of ordinary high water it must respond in damages to an owner whose land is overflowed and injured as a result of such obstruction.

MUNICIPAL CORPORATIONS — LIABILITY FOR NEGLIGENCE — PRESCRIPTION — STATUTE OF LIMITATIONS. — When a municipal corporation has been guilty of negligence in the construction of a bridge, resulting in overflow and injury to private land, the fact that no action is brought to recover damages until twenty-two years after the construction of the bridge is no evidence of a prescriptive right to flow such land; nor does the statute of limitations affect the right of action for damages suffered within the period prescribed by it.

TRESPASS to recover damages to land from overflow caused by the negligent construction of a bridge. The bridge in question was erected by the defendant in 1866. Plaintiff claimed and gave evidence of damage suffered from the backing up of water on his land in the years 1888 and 1889. Judgment for plaintiff and defendant appealed.

Harry Alvin Hall, for the appellant

Ernest J. Wimmer, for the appellee.

GREEN, J. This was an action of trespass brought to recover damages occasioned, as alleged by the plaintiff, by the negligent construction of a stone bridge over Elk Creek, by

the defendant. The bridge was erected in 1866 by the borough authorities over Elk Creek within the borough limits. The plaintiff claims, and on the trial gave evidence to prove, that the whole width of the creek between the abutments was twenty-two feet ten inches, and alleges that it might and should have been built with one span only, so as to leave the water of the stream to flow freely and without obstruction. He also further alleges, and gave evidence to prove, that the bridge was built with two narrow spans, about nine feet in width each, with a pier about three feet in width in the center. This, the plaintiff claims, was a negligent construction of the bridge by the defendant, which resulted in the water of the stream being backed up and obstructed so as to overflow his house and land immediately above the bridge in times of ordinary freshets, causing him damage and injury. The learned court below submitted the cause to the jury entirely on this issue, charging them as follows: "Now in order that the plaintiff may recover against the borough any damages, it is necessary for him to establish by the evidence in the case that the damages resulted from the acts and conduct of the defendant. In other words the evidence must show to the satisfaction of the jury, that the overflowing of his land was caused by the improper erection of the pier in the center of the bridge across Elk Creek. . . . If in the erection of the bridge there were sufficient space left to pass an ordinary freshet, the borough would not be liable to Krug, although his land might be overflowed. . . . If you come to the conclusion that the damages which Krug claims in this suit were caused by the improper and unskillful erection of the bridge, and that the bridge was not capable of passing the water of an ordinary freshet, then you determine from the evidence what amount of damages he has sustained. . . . If you come to the conclusion that the bridge was erected by the borough of St. Mary's in such a manner as to pass the water through the arches in time of an ordinary freshet, and that the land was not overflowed by reason of the unskillful erection of the bridge, then your verdict should be for the defendant. If, however, you come to the conclusion that the bridge was so improperly and unskillfully erected that it did not allow the passage of the water in time of an ordinary freshet, then you ascertain from the testimony what damages Krug has sustained by reason of the erection of the bridge, causing the alleged overflow of his land."

The same idea was enforced by the court in answer to the points submitted on both sides, and hence the only question tried was whether the defendant had been guilty of negligence in the construction of the bridge, and in such a manner as to do injury to the plaintiff in the enjoyment of his land just above the bridge. No question was raised as to the right of the borough to build and to maintain the bridge at the point where it was erected, nor was there any contention on the part of the plaintiff as to the exclusive right of the defendant to determine the character of the structure, its location, the materials of which it should be built, and all the details of the construction. No other question was raised, or submitted to the jury, except the question of negligence of the defendant in the exercise of its right of construction, and if there was such negligence, whether it resulted in injury to the plaintiff. On the trial there was an abundance of testimony submitted by the plaintiff in support of his allegation of negligence. It was shown by a number of witnesses that, in times of moderate rises in the water of the stream, the passages left between the pier and the abutments were not sufficient to carry off the water; that whenever there was floating timber, logs, boards, barrels, or any other debris in the stream, it would be caught by the center pier and would obstruct the flow of the water so as to dam it up and raise it considerably higher above the bridge than it was below, and thus overflow the plaintiff's land. Witnesses also testified that there was no occasion for the center pier, and that if it had not been placed there the space between the walls of the bridge at each end would have been sufficient to pass all the water of the stream. The verdict in favor of the plaintiff was in accord with the testimony, and could not consistently have been otherwise. There was indeed, no real opposing testimony on the question of obstruction, nor on the question of negligence in the construction. There was certainly no occasion for the erection of a pier in the center of a bridge span the whole width of which was only twenty-two feet. The only engineer who was examined on the trial testified that the effect of the pier was to obstruct the flow of the water materially, and that, in his opinion, if the pier was out the space would be sufficient to carry off all the water in an ordinary flood. There was really no contrary testimony on this subject, and the case was simplified to the mere question of the negligent exercise of the right to construct the bridge.

The doctrine upon this subject is entirely free from difficulty, and is well expressed by Mr. Justice Agnew in delivering the opinion of this court in the case of *Allentown v. Kramer*, 73 Pa. St. 406. After referring to a number of cases which affirm the right of a municipality to raise its streets or bridge them, without liability for consequential injury, he proceeds as follows: "But the cases referred to, or some of them, state the distinction upon which this case was submitted to the jury, and which has been sustained in many other cases, to-wit: that for negligence either in the construction or repair of public works (when repair is a duty), the corporation itself must respond in damages for a special injury caused by its negligence," citing many cases. And again: "The right of the city to raise the street and to construct the bridge as a necessary part of the improvement, does not appear to have been drawn into question. The faulty and negligent construction of the bridge making it an obstruction to the flow of the water in ordinary rains, was a proper ground of recovery."

The law upon this subject is so perfectly familiar and so thoroughly well established, that a repetition of the authorities is quite unnecessary. No question arose as to the statute of limitations, or a prescriptive right to flood the plaintiff's lands. Whether there were any floods prior to 1884 we are not informed by the testimony, and we certainly cannot presume there were any in the absence of testimony to prove them. For those that occurred in that and subsequent years this and another action were brought, both within six years, and the fact that no similar action was brought in previous years proves nothing as to the right of recovery in these actions. There might have been no freshets in that period inflicting any serious injury, or the plaintiff might not have cared to incur the expense and annoyance of a lawsuit during that time. It is enough to know that there was not a particle of testimony proving or tending to prove the existence of a prescriptive or any right to flood the plaintiff's land by the back water at this bridge. The assignments of error are not sustained.

Judgment affirmed.

MUNICIPAL CORPORATIONS — DUTY IN CONSTRUCTING BRIDGES. — A city, in constructing bridges across its streets, is required to provide against such casualties liable to occur from overflow, as a cautious and prudent man should foresee and anticipate: *Bradford v. Mayor*, 92 Ala. 349; 25 Am. St. Rep. 60; *Perry v. Worcester*, 6 Gray, 544; 66 Am. Dec. 431, and extended note.

PRESCRIPTION — RIGHT TO OVERFLOW LAND ACQUIRED BY. — The right by prescription to maintain a culvert so constructed as to cause plaintiff's land to be overflowed, may be acquired by user for twenty years; but the user must have been such as to subject the company to an action at any time during the twenty years, and the company must show that at regular or irregular intervals during the twenty years the water has overflowed the land in controversy: *Emery v. Raleigh etc. R. R. Co.*, 102 N. C. 209; 11 Am. St. Rep. 727. See also *Sherlock v. Louisville etc. R'y Co.*, 115 Ind. 22.

REISER v. PENNSYLVANIA COMPANY.

[102 PENNSYLVANIA STATE, 23.]

MASTER AND SERVANT — FELLOW SERVANTS, WHO ARE. — A railroad locomotive fireman and a station agent, who is also a telegraph operator in the employ of the same company, are fellow servants, and the company, if free from fault, is not responsible for the negligence of one of such servants resulting in injury to the other.

MASTER AND SERVANT — NEGLIGENCE IN EMPLOYING SERVANTS. — Although a servant is not properly qualified for the place he occupies, and his negligence and incompetency result in injury to a fellow servant, the master is not liable therefor nor chargeable with negligence in employing or retaining him in the service unless the master has knowledge, or in the exercise of reasonable diligence should know, of the incompetency of the servant to discharge the duties of the position to which he is assigned.

MASTER AND SERVANT — VICE PRINCIPALS — NOTICE OF SERVANT'S INCOMPETENCY. — A railroad train dispatcher, who has no power to employ or discharge the telegraph operators in the employ of the company, is not a vice principal as to them, and notice to such train dispatcher of the incompetency of such telegraph operators is not notice to the company so as to make it responsible for the negligence of an operator resulting in an injury to his fellow servant.

ACTION to recover damages for personal injury caused by negligence. Judgment for defendant, and plaintiff appealed.

George A. Allen and L. Rosenzweig, for the appellant.

J. R. Thompson, for the appellee.

McCOLLUM, J. Adam Reiser was in the employ of the Pennsylvania Company as a fireman, and the proximate cause of the collision in which his life was taken was the negligence or incompetency of W. W. Crossman, who was a station agent and telegraph operator in the employ of the same company, and his fellow servant. There was evidence tending to show that Crossman was not properly qualified for the place he occupied, but this alone was not sufficient to charge the company with negligence in employing him or in

retaining him in its service. It should also appear that the company knew, or in the exercise of reasonable diligence should have known, that he was incompetent to discharge the duties of the position to which he was assigned. An effort was made to affect the company with knowledge of his incapacity, and the result of it is found in the testimony of G. L. Campbell, Jacob E. Swap, and G. D. Gilson. Campbell, who was in the employ of the Pennsylvania Company at Albion as station agent and telegraph operator for some time prior to July, 1885, testified that Crossman was in his office from the spring of 1884 to the first of January, 1885, for the purpose of learning and practicing telegraphy, and that when he left it he was not a skillful operator. He also testified that the telegraph operator at Pittsburgh, and Perdue, the chief train dispatcher, wished him "to keep that cub (meaning Crossman) off the line." He does not state how, when, or to whom this wish was expressed, or what reason, if any, was given for it. He admitted, however, that he kept Crossman in his office in violation of a rule of the company, and it is not strange that his fellow servants "wished" him to comply with a reasonable regulation established by their common employer. Jacob E. Swap testified that directly after Crossman was put at Wheatland as station agent, he said to Perdue "what are you doing with that noodle up at Wheatland?" That Perdue inquired what he meant, and he replied: "Crossman, the agent there, he will get you into trouble yet; he don't know what he is doing half the time." He also testified that Crossman "was very flighty in his disposition and was rattled in his business," and that he thought he was incompetent. Gilson was of opinion that Crossman was not qualified for the place he filled, although he would not say he was an unskillful operator. This is the evidence relied on by appellant to show that the company knew Crossman was incompetent at the time it employed him, or retained him in its service after notice of his incompetency. It should be stated in this connection that Campbell was the only witness whose knowledge of Crossman's alleged incapacity antedates his employment by the Pennsylvania Company, and this knowledge relates to a period several months prior to such employment. On this branch of the case the company might have relied on the presumption that it exercised due care in the selection of its servant whose negligence caused the collision, because Campbell's evidence was insufficient to rebut it. But

it did not do so. It showed by testimony which was not disputed that such care was in fact exercised. Did the company have notice while Crossman was in its service that he was incompetent? We think not, unless notice to Perdue was notice to the company. It is contended by the appellant, on the authority of *Lewis v. Seifert*, 116 Pa. St. 628, 2 Am. St. Rep. 631, that Perdue was a vice principal, and that his knowledge of the incompetency of the station agents and telegraph operators in the service of the company must be considered as its knowledge. This might be so if he was clothed with the power of employing and discharging such servants. But he was not charged by the company with its duty in reference to the selection and retention of its employees. To the extent that he was the representative of the company in the performance of a positive duty it owed to its servants, it is responsible to them for his negligence, but beyond that it is not. The contention of the appellant that the knowledge of Perdue respecting the qualifications of Crossman was the knowledge of the company finds no support in *Lewis v. Seifert*, 116 Pa. St. 628, 2 Am. St. Rep. 631. In that case the company was held liable for an injury to an employee caused by the negligence of its representative in the performance of a duty it owed to its servants. In this case the death of Reiser was attributable to the negligence of Crossman, who was his fellow servant, and as the company was not in default in employing him or in retaining him in its service, it is not responsible for the consequences of his negligent act.

We are unable to discover any negligence on the part of the train dispatcher or his assistants in connection with the order in question. It was given in conformity with the rules, and there is no evidence which justifies an inference that in establishing them the company was in any default. The specification of error is overruled.

Judgment affirmed.

MASTER AND SERVANT—INCOMPETENT SERVANT—MASTER'S LIABILITY TO FELLOW SERVANT. — To entitle a servant to recover for the negligence of his fellow servant, it must be shown that the latter was selected without reasonable care, that he was incompetent, and was continued in service after his incompetency was known to the master: *McMaster v. Illinois etc. R. R. Co.*, 65 Miss. 264; 7 Am. St. Rep. 653, and note; *Evansville etc. R. R. Co. v. Gayton*, 115 Ind. 450; 7 Am. St. Rep. 458, and note. Where a servant is in the habit of neglecting his duty, and such negligence is known, or by the exercise of reasonable diligence could have been known to the master, the latter is liable for his negligence: *Coppins v. New York etc. R. R. Co.*, 122

N. Y. 557; 19 Am. St. Rep. 523, and note; *Peterson v. Chicago etc. R'y Co.*, 67 Mich. 102; 11 Am. St. Rep. 564, and note; note to *Jones v. Old Dominion etc. Mills*, 3 Am. St. Rep. 106.

MASTER AND SERVANT — VICE PRINCIPALS — POWER TO EMPLOY AND DISCHARGE. — Where one is authorized to employ and discharge servants working under him, and under his direction and control, his negligence is that of the master: *Nix v. Texas etc. R'y Co.*, 82 Tex. 473; 27 Am. St. Rep. 897, and note; also see *Palmer v. Michigan etc. R. R. Co.*, 93 Mich. 363; 32 Am. St. Rep. 507, and note, with the cases discussing this subject collected.

MASTER AND SERVANT — WHO ARE FELLOW SERVANTS. — In *East Tennessee etc. R. R. Co. v. De Armond*, 86 Tenn. 73; 6 Am. St. Rep. 816, it was held that a telegraph operator and the conductor of a train were not fellow servants. The following cases have held that train dispatchers and trainmen were not fellow servants: *Lewis v. Seifert*, 116 Pa. St. 628; 2 Am. St. Rep. 631; *Smith v. Wabash etc. R'y Co.*, 92 Mo. 359; 1 Am. St. Rep. 729; *Darrigan v. New York etc. R. R. Co.*, 52 Conn. 285; 52 Am. Rep. 590, and see also the notes to the above cited cases.

FAHNESTOCK v. FAHNESTOCK.

[152 PENNSYLVANIA STATE, 56.]

WILLS — POWER OF SALE — EQUITABLE CONVERSION OF REALTY INTO PERSONALTY. — A mere power contained in a will to sell real estate does not operate as a conversion of it into personalty, but such power coupled with a direction or command to sell will have that effect.

WILLS — POWER OF SALE — EQUITABLE CONVERSION OF REALTY INTO PERSONALTY. — When a testator authorizes his executors to sell his real estate and to execute and deliver to the purchaser thereof deeds in fee simple, and it is clear from the face of the will that it was the testator's intention that the power so conferred by him shall be exercised, it will be construed as a direction to sell and will operate as an equitable conversion of the property into realty.

WILLS — POWER OF SALE — EQUITABLE CONVERSION OF REALTY INTO PERSONALTY. — A mere power contained in a will to sell real estate does not operate as a conversion of it into personalty, but when it plainly appears from the will that it was the testator's intention that this power should be exercised, and that effect cannot be given to material provisions without its exercise, an equitable conversion of the property is as effectually accomplished by the will, as if it contained a positive direction to sell.

WILLS — POWER OF SALE — EQUITABLE CONVERSION OF REALTY INTO PERSONALTY. — When a will contains a power given to the executors to sell the estate, and it is also apparent from its face that the testator intended that his estate real and personal should be converted into money for distribution or investment and the payment of interest and income to his beneficiaries as directed, the will itself will work an equitable conversion of the whole estate into personalty, although it also provides that such beneficiaries may become purchasers of his real estate as directed, and receive conveyances therefor from the executors, as this latter provision is only additional evidence of an intention on the part

of the testator that the beneficiaries should take no title except by purchase from the executors.

WILLS — POWER OF SALE — FAILURE TO EXERCISE. — Failure of executors to exercise a power of sale contained in a will within a fixed time as directed, does not destroy the power. It only takes away the discretion of the executors as to the time of the exercise of the power, and makes it their absolute duty to exercise it upon the expiration of the time fixed.

BILL for partition under the following will of B. L. Fahnestock, deceased:—

“First. I order and direct my executors to pay out of the assets of my estate all my debts of every description.

“Second. I hereby empower and authorize my executors to sell all my real estate and personal property at public or private sale, and to make and execute deeds in fee simple for my real estate; but should any of my devisees hereinafter named desire to purchase any part or parts of my real or personal property, not to exceed their proportionate share in my estate, they shall have the first choice, according to their respective ages (the eldest first), at a valuation to be fixed by my executors hereinafter named; but in case the valuation fixed by my executors is not satisfactory to any of them, then it shall be determined by three disinterested parties, one to be chosen by the party desiring to purchase, one by my executors, and the two thus chosen to choose the third. The decision of said referees shall be final and conclusive, and thereupon my executors shall make a deed in fee simple for such real estate, or make a proper transfer of such personal property upon such price and upon such terms as said referees may agree upon said award.

“Third. I give and bequeath unto my wife, Mary F. Fahnestock, all my household goods and furniture, also one third of all my estate, to have and to hold the same during her natural life, and at her death the same one third shall be divided and disposed of as follows, viz.: To my daughter, Henrietta Fahnestock, one-sixth part; to the surviving children of my son, Charles H. Fahnestock, their heirs and assigns, one-twelfth part, to be divided among them share and share alike; to my son, Benjamin S. Fahnestock, his heirs and assigns, one-sixth part; to my daughter, Caroline Ringold Vandervoort, her heirs and assigns, one-sixth part; to my son, Vernon Fahnestock, his heirs and assigns, one-sixth part; to Vernon Fahnestock, in trust for my son Levi Fahnestock, as hereinafter specified, one-sixth part; to my grandson, William E.

Fahnestock, and granddaughter, Ida May Fahnestock, children of my son, Walter B. Fahnestock, deceased, one-twelfth part, to be divided between them, share and share alike, and I direct my executors to invest the said one twelfth so bequeathed unto my said named grandchildren, in good mortgages, real estate, or other safe securities, and to pay over to the said William E. Fahnestock and Ida May Fahnestock, the interest or income thereof quarterly, share and share alike, during their natural lives; and at the death of either of them, one half of the principal shall be paid to his or her children, but in case of the death of either or both of my said grandchildren, leaving no children to survive him, her, or them, his, her, or their share shall be divided among my surviving children, share and share alike, the children of any deceased child to take the same share his, her, or their parents would have taken if living.

"Fourth. All the rest and residue of my estate (real and personal) I give, devise, and bequeath as follows: One-sixth part thereof unto my daughter, Henrietta Fahnestock, her heirs and assigns; one twenty-fourth part thereof unto my son, Charles H. Fahnestock, which shall be invested by my executors in mortgages or other safe securities, the interest of which shall be applied by them to his support, in case the United States government, in whose care he now is, shall cease to care for or support him; but I further direct my executors shall send him, out of the interest of the foregoing bequest, clothing to an amount not exceeding one hundred dollars per annum. At his death the foregoing bequest and accumulations accruing thereon shall be divided among his children, share and share alike. One twenty-fourth part to the children of my son, Charles H. Fahnestock, their heirs and assigns, to be divided among them, share and share alike. One-sixth part thereof unto my son, Benjamin S. Fahnestock, his heirs and assigns. One-sixth part thereof unto my daughter, Caroline Ringold Vandervoort, her heirs and assigns. One-sixth part thereof unto my son Vernon Fahnestock, his heirs and assigns. One-sixth part thereof unto Vernon Fahnestock, in trust for my son, Levi Fahnestock, upon the trust hereinafter mentioned. Unto my grandson, William E. Fahnestock, and my granddaughter, Ida May Fahnestock, children of my son, Walter B. Fahnestock, deceased, one-twelfth part, which I direct my executors to invest in good mortgages, real estate, or other safe

securities, the interest or income of which they shall pay to the said William E. Fahnestock and Ida May Fahnestock, share and share alike, quarterly during their natural lives, and at the death of either of them, one half of the principal shall be paid to his or her children; but in case of the death of either or both of my said grandchildren, leaving no children to survive them, his, her, or their share shall be divided among my surviving children, share and share alike; the children of any deceased child to take the same share, his, her, or their parents would have taken if living.

"Fifth. The foregoing bequests and devises to Vernon Fahnestock, trustee for Levi Fahnestock, are to be held by him on the following trusts, to invest such sum or sums as he may receive from time to time in the settlement of my estate, in such securities as in his judgment he may deem safe, and to change investments from time to time, and to pay over the income therefrom derived to said Levi from time to time during the life of my said son Levi, without the power of assignment or anticipation on the part of my said son Levi, and without liability of the principal or income for the debts, liabilities, or contracts of the said Levi, and without liability to execution or attachment by any creditor of said Levi; and on the death of said Levi, leaving child or children, or the children of child or children, the said income, dividends, and profits arising from the said trust to be applied to the education, maintenance of his child or children, and on the arrival at legal age of his said child or children, then this trust to cease, and the principal of the same to be paid over to said child or children, share and share alike. In the event of my child Levi dying, leaving no child or children, then the principal to revert to my legal heirs in the same proportions as bequeathed to them in my said will.

"Sixth. I nominate and appoint Alexander V. Verner and my son, Benjamin S. Fahnestock, executors of this, my will, and I hereby give them two years after my decease for the final settlement of my estate; but in case my executors, for good and sufficient reason, require a longer time, with the consent of a majority of my heirs, the time may be extended two years."

S. Schoyer, Jr., and W. A. Schmidt, for the appellant.

W. B. Rodgers and A. K. Stevenson, for the appellee.

McCOLLUM, J. This is an appeal from a decree dismissing the bill of Benjamin S. Fahnestock for the partition of certain

real estate situate in the second ward of the city of Pittsburgh, of which his father, Benjamin L. Fahnestock, who died testate on the 8d of January, 1888, was seised in fee. It was alleged in the answer that by the provisions of the will of Benjamin L. Fahnestock there was an equitable conversion of his real estate into personalty. The case was set for hearing on bill and answer, which together contained such portions of the will as were deemed necessary by the parties to a proper understanding and decision of the question raised. It is not contended that the words, "I hereby empower and authorize my executors to sell all my real and personal property at private or public sale, and make and execute deeds in fee simple for my real estate," standing by themselves, operate as a conversion, but it was thought by the learned judge of the court below, and it is insisted by the appellees here, that these words, taken in connection with the other provisions of the will, exhibit a clear intention and purpose on the part of the testator that his real and personal property shall be converted into money for investment, and the collection and disbursement of interest or income in accordance with his directions therein, and further, that it is not possible to execute the will according to its terms without such conversion of his real estate.

A mere naked power to sell real estate does not operate as a conversion of it into personalty, but such power, coupled with a direction or command to sell, will have that effect. If a testator authorizes his executors to sell his real estate, and to execute and deliver to the purchasers deeds in fee simple of the same, as in this case, and it is clear from the face of his will that it was his intention that the power so conferred by him should be exercised, it will be construed as a direction to sell, and operate as an equitable conversion. If in addition to this clear intention of the testator it plainly appears that effect cannot be given to material provisions of the will without the exercise of this power, the conclusion is irresistible that a conversion is as effectually accomplished by the will, and the duties of the executors under it are the same, as if it contained a positive direction to sell. While these principles are not disputed by the appellant, he contends that they are not applicable to this case; that the authority given to the executors to sell was for the purpose of paying the debts of the testator, and as these have been paid or satisfactorily arranged, the power no longer exists. We cannot agree

that the authority given to the executors to sell the real estate was limited in accordance with this contention. It is apparent on the face of the will that the testator intended his property, real and personal, should be converted into money, for distribution, investment, and the collection and payment of interest or income, as he had directed. It is true he provided in his will that the beneficiaries named therein might become purchasers, in the manner prescribed by him, of portions of his property, and receive from his executors deeds in fee simple of the real estate, and proper transfers of the personal property so purchased by them. But this was a privilege which they have not exercised, and we merely refer to it now as showing that the testator did not intend they should take title to any portion of his real or personal property except as purchasers of it from his executors.

It is not possible to execute certain provisions in the third and fourth clauses of the will without a conversion of the real estate, as well as the personal property, into money. In the one third of his real and personal estate given to his widow during her life, his grandchildren, William E. Fahnestock and Ida May Fahnestock, have under the third clause of the will a one-twelfth part, which his executors are required to invest in good mortgages, real estate or other safe securities, and to pay over to the said William E. Fahnestock and Ida May Fahnestock the interest or income thereof quarterly, share and share alike, during their natural lives. In the residue of his real and personal estate, his son, Charles H. Fahnestock, is given by the fourth clause of the will a one-twenty-fourth part, to be invested by the executors in mortgages or other safe securities, the interest of which is to be applied by them to his support, in case the United States government shall cease to care for or support him; and William E. Fahnestock and Ida May Fahnestock have a one-twelfth part, to be invested, and the interest or income of it to be paid to them by the executors in the manner and during the period provided for in the third clause already referred to.

As there can be no final settlement of the estate, in accordance with the will, until the power conferred upon the executor for the sale of the real and personal property is exercised, there should be no further delay in the execution of it. This power was not destroyed by the default of the executors; it survived their failure to exercise it within the four years allowed by the sixth clause for a final settlement of the

estate. During this period they had some discretion as to the time of its exercise, but they have none now. The specifications of error are not sustained.

Decree affirmed, and appeal dismissed at the costs of the appellant.

WILLS — POWER OF SALE — EQUITABLE CONVERSION OF REALTY INTO PERSONALTY. — A will produces an equitable conversion of realty into personalty when it devises such real estate to the executors, and gives the power to sell it and dispose of the proceeds among designated beneficiaries: *Greenland v. Waddell*, 116 N. Y. 234; 15 Am. St. Rep. 400; and it is not necessary that an express declaration to that effect be made in the instrument; it may arise by necessary implication from the nature of the instrument or the language employed: *Haward v. Peasey*, 128 Ill. 430; 15 Am. St. Rep. 120, and note. But equitable conversion of realty into personalty by will, so as to cut off heirs, does not take place unless the executor or other donee of the power takes the fee by inevitable implication, or such fee is in express terms conferred on him: *Eneberg v. Carter*, 98 Mo. 647; 14 Am. St. Rep. 664. For a further discussion of this subject, see note to *McFadden v. Hefley*, 13 Am. St. Rep. 681, and extended note to *Ford v. Ford*, 5 Am. St. Rep. 141-148.

BOYLE v. BOYLE.

[152 PENNSYLVANIA STATE, 103.]

WILLS — CONSTRUCTION OF PRECATORY WORDS. — A provision in a will that "I give and bequeath to my wife all my property, real and personal, for her support during her natural lifetime; any remainder at her decease to be disposed of by her as she may think just and right among my children," imports a gift, and gives to the wife upon the death of the testator a fee in the property with all its incidents, including the power to sell and to devise. The words referring to any remainder do not limit the wife's estate or the preceding words of gift, but are precatory, and do not create a trust in favor of the children.

WILLS — CREATION OF TRUST. — The intention of a testator to create a trust must be apparent from the face of his will, apart from the mere existence of words of trust and confidence, or none will be deemed to exist.

WILLS — PRECATORY TRUSTS, WHEN NOT CREATED. — Mere precatory words, or words of command or of explanation, contained in a will, are not enough to create a trust, or to establish an intention not to be gathered from a consideration of the operative words upon the face of the instrument.

Louis E. Grim, Henry Hice, and David S. Naugle, for the appellants.

Edward B. Daugherty and William B. Cuthbertson, for the appellee.

WILLIAMS, J. It is conceded that David Boyle was, at the time of his death in 1866, the owner of the land in controversy,

and that both parties to this action claimed title under him. The plaintiff seeks to recover, as one of the children and heirs at law, his distributive share in his father's real estate under the intestate laws. The defendants rely upon the last will and testament of David Boyle, by the terms of which he devised an estate in this land to his wife. If that estate was for life only, then the plaintiff would seem to be entitled to a verdict; but if it was an estate in fee simple, then the defendants are her successors in title, and the plaintiff cannot recover. This controversy depends, therefore, on the construction of the will which is in the following form: "As to my worldly goods, after my just debts are paid, I give and bequeath to my loving wife Rhoda all my property, real and personal, for her support during her natural lifetime; any remainder at her decease to be disposed of by her, as she may think just and right, among my children." The real estate consisted of a one-half interest in a farm of ninety acres. The personal estate consisted of three cows, some farming tools, and his household furniture. The total value of both real and personal estate was probably, at the time of testator's death, not far from two thousand dollars. The will was duly probated, and the widow took possession under it. She used the property for about two years and died. By her will she divided the real estate between two sons, John C. and Henry. She gave the personal estate in equal parts to Andrew, another son, and to the four daughters. The plaintiff was at this time in California, whither he had gone as early as 1857, and where he had continued to reside. He had been absent for eleven years when his mother made her will, and whether she knew that he was living does not appear. She did not name him in her will. Mrs. Boyle's will was duly proved, and John C. and Henry went into possession, and they and those holding under them have remained in possession from the death of their mother in 1868 down to the bringing of this suit in 1890. When they took possession, the land was of little value, and the improvements were unimportant. During the twenty-two years that had elapsed when this suit was brought, two lines of railroad had been built over this little farm. The region in which it lies had been developed, and the value of the land greatly increased. After this lapse of time and this great change in the value of the property, the plaintiff brings his action on the theory that his father's will gave to his mother only a life estate with a power of appointment among his

children in fee; and as he was not named in her will, the execution of the power of appointment was for that reason defective, and no title passed under it. Upon the death of Mrs. Boyle, without having made a valid appointment, he contends that the real estate descended to the heirs at law of David Boyle, of whom he is one, and he asks to be allowed to recover one-eighth part of the real estate of which his father died seised.

The question thus presented is over the estate given by the will of David Boyle to his wife Rhoda. It can admit of no doubt that the primary object of the testator's solicitude was his wife. Their children had reached maturity, and most of them were settled in homes of their own. If his wife survived him, she would need the care and support that he could no longer provide in person. He accordingly made his will, putting all that he had into her hands that she might use it "for her support during her natural life." The words of the will import an absolute gift. "I give and bequeath to my loving wife, Rhoda, all my property, real and personal." The reason he gives for this disposition of his property shows that he intended to invest her with a power of disposal, for he explains that it is "for her support." A life estate in his undivided one half of ninety acres would have been practically valueless to her in the condition in which the land then was. The words relied upon as conferring a power of appointment show with equal certainty the testator's purpose to give her a power of sale of the real as well as the personal property. He says, "any remainder at her decease," thus clearly indicating his idea that there might be nothing at all left to go to anyone; but if anything should remain of the estate so given to his wife, he expresses a wish that it may "be disposed of" not in a manner directed by him, but "by her as she may think just and right among my children." There is, therefore, a power of sale to be exercised during her lifetime for her support, and a power to dispose by will of "any remainder" left unsold and unconsumed. In the exercise of this power of disposition she is not bound by any rule of distribution which the testator lays down, but is left to do what, in view of her children's circumstances and condition, may seem to her mother's heart right and just when she comes to prepare her will.

This view of the will is conclusive of this case. It gives the widow a fee with all its incidents, including the power to sell

and the power to devise, accompanied by the expressed wish of the testator that if anything shall be left unsold it may go to their children. Not necessarily in equal parts, or to all the children, but to so many and in such proportions as she may determine, when the time comes, to be "right and just." The words referring to "any remainder" do not limit his wife's estate or the preceding words of gift, but are precatory. They show his wish that if anything remains out of the little he left to his wife it may go to their children, but he submits the whole subject to her sense of right.

It is suggested that the words of trust and confidence employed by the testator operate to destroy her estate and turn her into a trustee for all the children, so that she could not change their relative rights or interfere with the trust estate further than to use its income during her natural life. But words of trust and confidence, without more, do not create a trust or turn a devisee into a trustee. The intention of the testator to create a trust must be apparent, apart from the mere existence of words of trust and confidence, or none will be held to exist.

The history of the rise, decline, and fall, in this state of the doctrine that words of confidence import a trust, is illustrated in the several cases arising under Pennock's will. The doctrine was borrowed several centuries ago by the English courts from the Roman law, and was first recognized and applied in this state in *Coates's Appeal*, 2 Pa. St. 129, which arose upon Pennock's will. A bequest of personal estate was made by the testator to his wife, absolutely, followed by these words: "having full confidence that she will leave the surplus to be divided at her decease justly among my children." Upon these words it was held that the widow became a trustee for the children so that she could not use the *corpus* of the gift to her, but only the income derived therefrom. A few years later the same bequest came under consideration in *McKonkey's Appeal*, 13 Pa. St. 253, and it was then held that the widow was not restricted in the use of the bequest to her by the words of confidence, but only in the disposition of the surplus remaining at her death. The conclusion then reached was that as to such surplus the will of her husband clothed her with a power in the nature of a trust, so that all the children were beneficiaries and entitled to share to some, though not necessarily to the same, extent in the unconsumed surplus of the gift to her. Finally in *Pennock's Appeal*, 20 Pa. St.

268, 59 Am. Dec. 718, the same bequest was before this court for the third time and the doctrine of a power in the nature of a trust, arising from words of confidence, was repudiated. The last vestige of the Roman doctrine on the subject was discarded, and in a well reasoned opinion it was held that the gift to the widow was absolute. The words of confidence were precatory; and both as to the income and the *corpus* the power of the widow as owner was without limitation.

Our later cases, with perhaps one or two exceptions, in which the question was obscured by other considerations, have followed Pennock's Appeal. In *Kinter v. Jenks*, 43 Pa. St. 445, the testator gave the residue of his estate to his wife for her use and comfort and to be disposed of as she pleased at her death, "when no doubt she will make distribution of the same among our children." These words were held to give the wife an estate in fee simple. In *Becks' Appeal*, 46 Pa. St. 527, the testator gave, *inter alia*, an annual sum to be paid to his wife "for house rent." The executor claimed the right to withhold this annual sum for such years as the widow paid no house rent. We held the words, "for house rent," to be explanatory merely; and that it was the duty of the executor to pay the annual sum without inquiring what was done with it. A similar question was raised in *Jaureche v. Proctor*, 48 Pa. St. 466. The testator gave certain real and personal estate to his wife absolutely, but added "she not to divest herself of what I may leave her until after her death"; and directing that she should divide what then remained "in equal shares among my children." It was contended that under the terms of this will the widow took a life estate only, but this court held that she took a fee, and sustained her deed made some time before her death. A still stronger case was presented in the *Second Reformed Presbyterian Church v. Disbrow*, 52 Pa. St. 219. The testator gave real estate to his wife by his will with words of *habendum*, "to have and to hold and enjoy during her lifetime, and dispose of the same as shall seem best unto her." In the following clause he added: "It is my wish and desire that my wife will leave at her death the property, or any part that may be then remaining in her hands, for the benefit of young men studying for the ministry." We held that the wife took a fee simple and that the words of confidence, expressive also of his desire, did not limit her estate in any particular. No less in point is *Bowlby v. Thunder*, 105 Pa. St. 173. In that case the testator gave

his estate to his wife absolutely. Then followed words of trust and confidence that she would divide the estate at her decease among their children and grandchildren. We held these words to be precatory and the estate of the wife a fee. *Paisley's Appeal*, 70 Pa. St. 153, resembled *Becks' Appeal*, 46 Pa. St. 527. The testator followed the words of gift employed in his will by words explanatory of his purpose in making the gift. The explanatory words were held to have no effect upon the gift.

In *Hopkins v. Glunt*, 111 Pa. St. 287, the testator followed the words of gift with words that were strongly precatory and it was contended that they qualified the gift. This contention was not sustained, but the general rule was stated to be: "After an unqualified devise by the testator, precatory words to his devisee cannot defeat the estate previously granted."

Nor will words declaratory of the testator's opinion or understanding have that effect. Thus in *McIntyre v. McIntyre*, 123 Pa. St. 329, 10 Am. St. Rep. 529, testator gave certain real estate to his wife and then added: "She will not have power to sell, but may leave the same to her children." This court did not adopt the testator's view of the legal effect of his devise, but held that she had full power to sell. Perhaps the latest case on this subject is *Good v. Fichthorn*, 144 Pa. St. 287, 27 Am. St. Rep. 630. The testator in that case as in the case under consideration gave his entire estate to his wife. In case she did not consume the whole estate he made the following direction: "I do hereby enjoin and direct her" to make a will and divide the remainder in a manner which he proceeded to indicate. We held in an opinion by our Brother Mitchell, which fully sustained the judgment, that words of command addressed by the deviser to the devisee are as ineffectual to reduce a fee to an estate for life, as precatory or explanatory words. This does not disturb the rule that words importing a fee may be limited in their operation and the estate reduced, where, upon the whole will, it is clear that the testator intended only a life estate, as was the case in *Urich v. Merkel*, 81 Pa. St. 332; but what we now say is that mere precatory words, or words of command, or words of explanation, are not enough to establish an intention that is not to be gathered from a consideration of the operative words upon the face of the instrument.

In the case before us the intent of the testator appears from the apt words of gift employed, and from the explanatory

words in immediate connection. If these words were transferred from the close, to the beginning of the words of gift, the sentence would read thus: "For the support of my loving wife Rhoda during her natural life I give her all my property real and personal." Such transposition to aid in reaching a testator's intention was adopted, and the practice sanctioned, in *Merkel's Appeal*, 109 Pa. St. 235, where the order of the bequests was changed in order to ascertain the testator's purpose.

The appellee places much reliance on *Follweiler's Appeal*, 102 Pa. St. 581, and *Cox v. Sims*, 125 Pa. St. 522, but they do not sustain his position. In *Follweiler's Appeal*, 102 Pa. St. 581, the testator's gift of his real and personal estate to his wife was made in express terms for life only, and the devise was construed in accordance with the words of the deviser. In *Cox v. Sims*, 125 Pa. St. 522, the testator gave certain real and personal estate to his wife, "to have and hold the same for and during the whole period of her natural life," and then devised the remainder to his children share and share alike. We held the devise over was good as to the real estate and took effect upon the termination of the wife's life; but that it was bad as to the personal estate, since an absolute gift of personalty for life clothes the donee with all the attributes of ownership. It is therefore apparent that these cases are in entire harmony with *Pennock's Appeal*, 20 Pa. St. 268; 59 Am. Dec. 718, and the long line of cases in which it has been followed.

As the title to David Boyle's real and personal estate passed to his wife under his will, and to the defendants or those under whom they claim by virtue of her will, the plaintiff has no title whatever, and the consideration of the other questions raised becomes unimportant.

The judgment is reversed.

TRUSTS — PRECATORY — DO NOT ARISE WHEN. — If property is given for the absolute benefit of, or to be at the disposal of the donee, especially if the donee be a parent, no trust will arise from subsequent words, showing that the maintenance of children was the motive of the gift: *Seamonds v. Hodge*, 36 W. Va. 304; 32 Am. St. Rep. 854, and note with cases collected discussing the creation of precatory trusts: *Good v. Fichthorn*, 144 Pa. St. 287; 27 Am. St. Rep. 630. See note to *McIntyre v. McIntyre*, 10 Am. St. Rep. 532, also extended notes to *Knox v. Knox*, 48 Am. Rep. 494, and *Harrison v. Harrison*. 44 Am. Dec. 372.

COLLINS v. DISPATCH PUBLISHING COMPANY.

[152 PENNSYLVANIA, 187.]

LIBEL — DEFINITION. — Any publication, injurious to the social character of another and not shown to be true, or to have been justifiably made, is actionable as a false and malicious libel. In other words a malicious defamation expressed in print or writing, or by signs or pictures tending to blacken the memory of the dead, with intent to provoke the living, or to injure the reputation of one who is alive and thereby expose him to public hatred, contempt, or ridicule, or to deny to him the possession of some worthy quality as every man is *a priori* to be taken to possess is libelous.

LIBEL — PRESUMPTION. — INJURY TO REPUTATION may be either presumed from the nature of the words themselves, or proved by evidence of their consequences, and the presumption that words are defamatory arises much more readily in cases of libel than in cases of slander.

LIBEL — INNUENDO QUESTION FOR COURT AND JURY. — The meaning of dubious words may be averred by innuendo, and the truth of the innuendo is for the jury; but the quality of an alleged libel, as it stands upon the record, either simply, or as explained by averments and innuendoes, is purely a question of law for the court, and in civil cases it is bound to instruct as to whether or not the publication is libelous, supposing the innuendoes to be true.

LIBEL — MALICE WHEN INFERRED. — When a publication considered either by itself or in connection with extrinsic facts, is defamatory, malice is an inference of law which the jury are bound to find according to the direction of the court.

LIBEL — ACTIONABLE WORDS. — A publication containing the following words is libelous and actionable *per se*: "Complaints from outside parties were sent to the department, one asking for his dismissal on account of intimacy with a well known young local elocutionist." These words do not need the aid of an innuendo.

LIBEL. — THE OFFICE OF AN INNUENDO is to aver the meaning of the language published; but, if the common understanding of mankind takes hold of the published words and at once, without difficulty, applies a libelous meaning to them, an innuendo is not needed and if used may be treated as surplusage.

TRESPASS for libel based on the following publication in a newspaper: "About six weeks ago Mr. Collins's removal was threatened on account of his personal habits. Postal Inspector Campbell left here then with the intention of having Mr. Collins removed, but the matter was smoothed over by Superintendent Collins promising to completely reform Complaints from outside parties were sent to the department, one asking for his dismissal on account of intimacy with a well-known young local elocutionist. Mr. Collins is a thoroughly competent man in postal matters, but the department has apparently taken exceptions to either his recent actions or his personal habits." Judgment of nonsuit was rendered against plaintiff and he appealed.

James S. Young and S. U. Trent, for the appellant.

A. M. Brown, for the appellee.

STERRETT, J. As defined in *Pittock v. O'Neill*, 63 Pa. St. 258, 3 Am. Rep. 544, a libel is "any malicious publication, written, printed, or painted, which by words or signs tends to expose a man to ridicule, contempt, hatred, or degradation of character." This definition has been employed in several other cases, among which are *Neeb v. Hope*, 111 Pa. St. 145, and *Barr v. Moore*, 87 Pa. St. 391, 30 Am. Rep. 367. In the latter it was supplemented by the conclusion drawn from a consideration of numerous authorities on the subject in 1 Am. Lead. Cas. 115, viz.: "that any publication, injurious to the social character of another and not shown to be true, or to have been justifiably made, is actionable as a false and malicious libel." A still more comprehensive definition, based on many well considered cases, is that given in 13 Am. & Eng. Ency. of Law, 294: "A malicious defamation expressed in print or writing, or by signs and pictures, tending to blacken the memory of the dead, with an intent to provoke the living, or to injure the reputation of one who is alive and thereby expose him to public hatred, contempt, or ridicule. It may be said generally that language in writing is libelous which denies to a man the possession of some such worthy quality as every man is *a priori* to be taken to possess, or which tends to bring a party into public hatred or disgrace, or to degrade him in society."

As is well said in *Odgers on Libel*, 1, "The right of every man to have his good name maintained unimpaired is 'a *jus in rem*, a right absolute and good against all the world.' Words which produce any perceptible injury to the reputation of another are called defamatory, and such written or printed and published words, if false, constitute a libel. Words, pictures, or signs, which on their face 'must injure the reputation of the person to whom they refer, are clearly defamatory, and, if false, are actionable without proof that any particular damage has followed from their use': *Odgers on Libel*, 1.

The fact that words employed by a defendant in any particular case have perceptibly injured the plaintiff's reputation, may be either presumed from the nature of the words themselves, or proved by evidence of their consequences. For obvious reasons, the presumption that words are defamatory arises much more readily in cases of libel than in cases of

slander. Many words, which if printed and published would be presumed to have injured the plaintiff's reputation, will not be actionable *per se*, if merely spoken. A slander may be uttered in the heat of the moment, and be almost as quickly forgotten, while the same words, written and published, not only show greater deliberation and malice, but are almost certain to inflict greater and more enduring injury. "*Vox emissæ volat; litera scripta manet*": Odgers on Libel, 2, 8.

Where words are of dubious import the plaintiff may aver their meaning by innuendo, and the truth of the innuendo is for the jury; but the quality of an alleged libel, as it stands upon the record, either simply, or as explained by averments and innuendoes, is purely a question of law for the court; and in civil cases the court is bound to instruct the jury as to whether the publication is libelous, supposing the innuendoes to be true. If the publication, considered either by itself or in connection with extrinsic facts, be defamatory, malice is an inference of law which the jury are bound to find according to the direction of the court: *Pittock v. O'Neill*, 63 Pa. St. 258; 8 Am. Rep. 544.

Applying these elementary principles to the facts disclosed by the record, and which the evidence tended to prove, the obvious conclusion is that a proper case for submission to the jury was presented, and that the learned court erred in refusing to take off the nonsuit.

The statement of claim, on which the issues of fact were raised by defendant's plea, is sufficient both in form and in substance. Since the procedure act of 1887, abolishing special pleadings, less formality than theretofore is required in stating a cause of action. Considered in connection with other portions of the article of which they form a part, the words complained of are clearly defamatory, even without the aid of an innuendo. In its ordinary signification, and as generally applied to persons, the word "intimacy" would be understood to mean a proper friendly relation of the parties; but, as employed in the article referred to, it has, and evidently was intended to have, a very different meaning. It conveys the idea of an improper relation, an intimacy at least disreputable and degrading, and tending, to such an extent, to unfit the plaintiff for the position he held, that "outside parties" were prompted to make complaint to the post office department and request his dismissal. It is impossible to read the article without being constrained to reach that conclusion. On their face,

without more, the words complained of are defamatory and actionable. In the statement they are laid with an innuendo which, if true, intensifies and greatly aggravates their meaning. As was said in *Hayes v. Press-Co.*, 127 Pa. St. 648, 14 Am. St. Rep. 874: "The office of an innuendo is to aver the meaning of the language published; but, if the common understanding of mankind takes hold of the published words and at once, without difficulty, applies a libelous meaning to them, an innuendo is not needed, and if used may be treated as surplusage." In this case there was some evidence tending to sustain the meaning averred in the innuendo. But as already stated the words upon their face, without invoking the aid of the innuendo, are defamatory and actionable; and if the case had gone to the jury, they should have been so instructed.

The publication of the article containing the alleged libelous matter was so clearly shown that the fact cannot be doubted; and it is equally clear that the plaintiff is the person therein referred to. For these and other reasons that might be suggested we think the case, as presented in the record, is not one in which a judgment of nonsuit should be sustained.

Judgment reversed and a *procedendo* awarded.

LIBEL — DEFINITION. — A libel is defined as a publication made in a spirit of malice, by writing, signs, or pictures imputing to another something which tends to injure his reputation, to disgrace or degrade him in society, and to lower him in the esteem and opinion of the world, or to bring him into public hatred, contempt or ridicule: *Cole v. Neustadter*, 22 Or. 191; *Jones v. Greeley*, 25 Fla. 629; *Delaware etc. Ins. Co. v. Croasdale*, 6 Houst. 181. The foregoing definition in part or in whole may be found in the following authorities: *Hardy v. Williamson*, 86 Ga. 551; 22 Am. St. Rep. 479; *Morey v. Morning Journal Ass'n*, 123 N. Y. 207; 20 Am. St. Rep. 730, and note; *Williams v. Davenport*, 42 Minn. 393; 18 Am. St. Rep. 519, and note; *Cerveny v. Chicago etc. News Co.*, 139 Ill. 345; *Holston v. Boyle*, 46 Minn. 432; *Allen v. Wortham*, 89 Ky. 485. See also extended note to *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 333.

LIBEL — INJURY PRESUMED. — It is presumed without proof of damages, that the unauthorized publication of actionable words, charging a crime, injures the character, reputation, and mental feelings of the party against whom the libel is directed: *Belo v. Fuller*, 84 Tex. 450; 31 Am. St. Rep. 75, and note; *Byam v. Collins*, 111 N. Y. 143; 7 Am. St. Rep. 726, and note; note to *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 339.

LIBEL — MALICE WHEN IMPLIED. — From a libelous publication the law implies malice: *Byam v. Collins*, 111 N. Y. 143; 7 Am. St. Rep. 726, and note; *Bradstreet Co. v. Gill*, 72 Tex. 115; 13 Am. St. Rep. 768, and note; *Ramsey v. Cheek*, 109 N. C. 270; note to *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 338.

LIBEL — OFFICE OF INNUENDO. — The office of the innuendo is to aver the meaning of the language published: *Hayes v. Press Co.*, 127 Pa. St. 642; 14 Am. St. Rep. 874; *Bourreseau v. Detroit etc. Journal Co.*, 68 Mich. 425; 6 Am. St. Rep. 320, and especially note. The office of the innuendo is to define the defamatory meaning the plaintiff put upon the words: *Price v. Conway*, 134 Pa. St. 340; 19 Am. St. Rep. 704; *Randall v. Evening News Ass'n*, 79 Mich. 266.

COMMONWEALTH v. DALZELL.

[152 PENNSYLVANIA STATE, 217.]

CORPORATIONS — RIGHT TO VOTE STOCK. — In the absence of statute or agreement, the right to vote stock as between the corporation and the person endeavoring to vote it follows the legal title of which the certificates and the stock book are *prima facie* evidence.

CORPORATIONS — PLEDGE OF STOCK AS COLLATERAL — RIGHT TO VOTE. — When corporate stock is pledged as collateral security, the question whether the debtor or creditor shall vote it, depends upon the terms on which the pledge is made, and in the absence of agreement between the parties the right to vote follows the legal title.

CORPORATIONS — RIGHT OF PLEDGEE TO VOTE STOCK. — When the by-laws of a corporation provide that all persons holding shares "either in their own right, or as trustees," shall have a right to vote, a person who is admitted to hold stock as pledgee, and who appears from the corporate books to hold it as trustee, is entitled to vote it, in the absence of an agreement, showing a reservation of that right to the pledgor.

CORPORATIONS — RIGHT OF PLEDGEE TO VOTE STOCK. — A statute which provides that upon the objection of a stockholder to the vote of stock at a corporation election, the judges thereof "shall inquire and determine summarily whether the name on the books is that of the absolute and *bona fide* owner thereof or of a holder of the same, as executor, administrator, guardian, or as trustee created by last will, or by decree of court, and if not the vote so tendered shall be rejected," does not include a pledge of stock with no express agreement as to voting power, and if the pledgee is otherwise entitled to vote it he may do so notwithstanding such statute. The enumeration of owners and trustees in such statute is not meant to be exhaustive and exclusive, nor a mandatory direction to reject all other votes.

QUO WARRANTO to determine the validity of a corporation election of directors. At such election one Eberhardt claimed the right to vote stock by proxy, such stock being held by Watson and Wood as trustees, and so registered on the corporation books. The right to vote the stock was denied and the votes rejected. If received they would have changed the result of the election. Judgment for the defendants and the plaintiff appealed. Other facts appear from the opinion.

John D. and Thomas M. Brown for the appellant.

A. M. Neeper and F. M. Magee for the appellees.

MITCHELL, J. The right of voting stock at corporate elections is an incident of ownership, to be exercised, of course, in the mode and under the restrictions prescribed by the charter and by-laws, but, nevertheless, a part of the stockholder's property, inherent in him by virtue of his title. As said by the present chief justice, in *Tunis v. Hestonville R'y Co.*, 80 Week. Not. Cas. 96: "The right of voting stock is inseparable from the right of ownership. The one follows as a sequence from the other, and the right to vote cannot be separated from the ownership without the consent of the legal owner." But though the person who votes must be an owner, "it does not follow that he must be the only one. If, for instance, stock is pledged as a collateral, whether the debtor or creditor shall vote depends on the terms on which the pledge is made. The power is, under these circumstances, necessarily to some extent severed from the ownership, and the parties may consequently determine on which side it shall lie": Hare, P. J., *Shelmerdine v. Welsh*, 47 Leg. Int. 26. In the absence of any agreement between the parties on this point, it would seem that the right to vote should follow the legal title. If that was allowed to remain in the pledgor, his right to vote could not be questioned; while, on the other hand, if the legal title was transferred to the pledgee, his *prima facie* right would be equally clear. It was held in *Aultman's Appeal*, 98 Pa. 505 (516), that the pledgee of stock as collateral transferred and standing in his name is, as to the corporation, the legal owner, and liable for assessments, etc., just as if he was the actual beneficial owner. If he is thus charged with the burdens of ownership, it would seem to follow that he is entitled to the corresponding rights and privileges.

These being the rights of the parties under the common law, we have now to consider the effect upon them of the act of May 7, 1889, P. L. 102. It is entitled, "An act defining evidence of stock ownership in corporations, and for determining the right to vote thereon," and begins by declaring that "the certificate of stock and transfer books, or either, . . . shall be *prima facie* evidence of the right to vote thereon by the person named therein as the owner." So far this is merely declaratory of the existing law, but it then proceeds, that upon objection by an actual stockholder, the judges of the election shall inquire and determine summarily whether the name on the books is "that of the absolute and *bona fide* owner thereof, or of a holder of the same as execu

tor, administrator, guardian, or as trustee created by last will and testament or by decree of court. If not, then the vote or votes so tendered shall be rejected." The critical question that arises on the first glance of this act is, whether the enumeration of owners and trustees is meant to be exhaustive and exclusive, and the direction to reject all other votes mandatory. It is at once apparent that this direction cannot be taken literally without consequences of the most sweeping and dangerous character. Whole classes of stockholders, whose rights are as indisputable as any of those named, would be disfranchised. Thus no trustee, unless created by will or decree of court, is to have his vote received, and the whole class of trustees under deeds, however carefully framed for the protection of the separate estates of married women, or the management of estates during minority, lunacy, insolvency, or spendthrift lives, and trustees of the funds of public or private charities which may have corporate stock among their investments, would be entirely excluded from any vote in the management of the property committed to their charge, and it is doubtful if any partner, manager of a limited or joint stock company, or officer of a corporation holding stock of other corporations, could be brought under the literal description of "absolute and *bona fide* owner," while they are certainly not trustees created by will or by decree of court. The rights in all these cases are as unquestionable, as absolute, and as much entitled to exercise and protection as any of those expressly named in the act. It is not supposable that the legislature, even if it could do so constitutionally, meant to strike them down in this indirect and summary way. They are rights of property, and can only be taken away, if at all, by the clearest and most imperative language. The statute is very loosely and improvidently drawn, and there is no construction of it entirely free from difficulty; but it is far more reasonable to suppose that the legislature had another and different intent. Corporate interests had grown so large, and the conflict of opposing views of internal management at times so violent, that elections not unfrequently became matters of public concern. Our recent reports show a number of appeals to the equitable powers of the courts not only to decide questions of voting rights, but to take entire charge of corporate elections. One such, involving enormous amounts of capital and great public interests, came to this court in *Gowen's Appeal*, 10 Week. Not. Cas. 85. Corporate elections

cannot be stopped to settle nice questions of legal title, and it is important to the interests of the corporations that their elections should proceed under their own rules and with their own officers. This statute appears to us as an outgrowth of that state of affairs, an effort in the direction of regular and orderly elections, to afford means of speedy and present determination of questions of voting as they arise, and as they may affect the interests of the corporations, a directory establishment of the *prima facie* in the enumerated cases for the guidance of the election officers, but not intended to interfere with the privileges of individual owners or the by-laws of corporations, and certainly not to take away or settle finally any legal rights. The enumeration of executors, administrators, guardians, and trustees created by will or by decree of court was in pursuance of this purpose, and was meant to afford a general *prima facie* rule for such cases.

That the existence of other trustees, not within the classes named, was not meant to be disregarded, appears by the second section, which prescribes that when a pledgor of stock as collateral for a debt has reserved the right to vote upon it, his vote shall be received. This also is only declaratory of the law as it stood before. But the case of a pledge with no express agreement as to the voting power, was not provided for. Whether this was merely through inadvertence or purposely, because questions of much nicety may arise in such cases, where rights will be dependent on the exact circumstances, it is not material to inquire. The act makes no express provision for such cases, and they must be decided upon the common law. The general rule is that as between the corporation and the person offering to vote, the right follows the legal title, of which the certificates and the stock books are the *prima facie* evidence. By-laws may establish a different rule, and there may be special circumstances to change the equities as to individuals or even as to the corporation: See Morawetz on Corporations, and the cases cited, sec. 488; Biddle on Stock Brokers, 342; Spelling on Private Corporations, sec. 880; Beach on Private Corporations, sec. 855; and some cases taking a contrary view, cited in Cook on Stock and Corporation Law, ed. 1889, sec. 468. But we have no question of that kind in the present case. The by-laws of the corporation provide that all persons holding shares "either in their own right, or as trustees," shall have the right to vote. In this there is no restriction as to the kind of

trustees or the mode or purpose of their appointment as such. It is admitted that Messrs. Watson and Wood held the title to the stock which was entered on the corporation books in their names as trustees. It is also admitted that they were pledgees, but it does not appear that the pledgors had reserved the right to vote. Both by the common law and the corporate by-laws, therefore, they were entitled to vote. It was a right of property incident to their legal title to the stock, and the declaratory and directory provisions of the statute did not take it away. Their votes should have been received and counted.

The result of counting these votes, as appears, will be that the election was incomplete and abortive as to the four vacancies for which five candidates received equal votes. Whether the by-laws provide in any way for such a contingency, or for a special election to supply the failure, or the difficulty can be arranged by the withdrawal of one of the candidates, or in some other way, we are not informed. We cannot, therefore, enter a final decree, but must send the case back for further proceedings.

Decree reversed, and record remitted for further proceedings in accordance with this opinion.

CORPORATIONS—RIGHT OF PLEDGEE TO VOTE STOCK.—A pledgee of corporate stock, who appears by the books of the corporation to be the owner thereof, has the right to vote whatever stock stands in his name at an election of directors; and in such a case, the pledgor has no right to vote such stock: *In re Argus Printing Co.*, 1 N. D. 435; 26 Am. St. Rep. 639, and note; but under the Colorado statutes the owner of pledged stock may represent it at all meetings of the stockholders, and vote accordingly: *Miller v. Murray*, 17 Col. 408. Stock owned by the corporation cannot be voted, however, though held by a trustee: *American R'y etc. Co.*, 101 Mass. 398; 2 Am. Rep. 377; *Brewster v. Hartley*, 37 Cal. 15; 99 Am. Dec. 237.

CORPORATIONS—WHO ENTITLED TO VOTE STOCK.—The transfer book of the corporation is conclusive upon the question of who are entitled to vote at the election: *Matter of Long Island R. R. Co.*, 19 Wend. 37; 32 Am. Dec. 429, and note; *Ex parte Willcocks*, 7 Cow. 402; 17 Am. Dec. 525.

CHARTIERS BLOCK COAL COMPANY v. MELLON.

[153 PENNSYLVANIA STATE, 283.]

MINING RIGHTS—ACCESS TO STRATA UNDERLYING COAL. — A surface owner who has conveyed the coal under his land to a grantee has a right of access through the coal to the underlying strata, although he has not reserved such right in the deed of the coal.

MINING RIGHTS—NATURE OF ESTATE IN COAL. — When a surface owner has conveyed the coal under his land by grant, the grantee owns the coal, but nothing else save the right of access to it and the right to remove it; and when it is all removed, the estate therein ends, and the space it occupied reverts to the grantor by operation of law. The grant of the coal does not convey any interest in the strata underlying it.

MINING RIGHTS—REGULATION OF, WHEN LEGISLATIVE QUESTION. — When the surface owner has conveyed the coal under his land by grant, his legal right of access to the strata underlying the coal is clear; but the regulation of such right involves too many questions affecting the rights of property in and of injury to the underlying strata to be settled by the judiciary. It is a legislative rather than a judicial question.

MINING RIGHTS—ACCESS TO STRATA UNDERLYING COAL—INJUNCTION. — When a surface owner has conveyed the coal under his land by grant and is sinking oil or gas wells through the coal to tap the underlying strata, an injunction to restrain the sinking of the wells will not be granted when the owner of the coal has not suffered irreparable damage, and the effect of the injunction would be to destroy the estate of the surface owner in such underlying strata.

J. S. Ferguson, D. T. Watson, and J. G. MacConnell, for the appellant.

J. McF. Carpenter, for the appellee.

PAXSON, J. This is a case of first impressions, and of very grave importance; and in view of these facts we have been asked to express our opinion of the law bearing upon it, notwithstanding it is an appeal from a decree awarding a preliminary injunction. The facts are probably as fully before us now as they will ever be.

The contest arises between the owner of the surface, or his lessees, and the Charters Block Coal Company, the plaintiff below and appellant, which is the owner in fee of the coal beneath the surface. The company purchased the coal on December 22, 1881, and the deed conveying it granted not only all the coal, but also the mining rights and privileges, including the right to enter mines and carry away all the coal; the right to make openings or entries, aircourses, watercourses, drainage, and shafts, with right of ingress and egress for the purpose of making such openings, with right of way for taking

such coal or any other coal and minerals through the entries, and also the right to enter upon the surface of the land for the purpose of taking into and placing on the same any material that it may desire and need in its coal operations, and when making entries or shafts, the right to deposit the debris and slack near the openings.

The grantor, in conveying the coal with these privileges, reserved to himself no right, privilege, or easement in said coal, or any part thereof, and no right of way through said coal from the surface to obtain gas or oil, or any other substance. It is not likely at the time the grant was made that it occurred either to the grantor or the grantee of the coal that underneath the latter there might lie another substance of perhaps greater value than the subject of the grant itself. It now appears that the coal is underlaid with the oil and gas bearing sand, which can only be reached by sinking wells from the surface through the strata of coal. Shortly before the filing of this bill it began to be known that oil or gas existed in large quantities in that part of Allegheny County where the appellant's works are situated, and active operations had begun in the early summer of 1891 by oil operators to obtain this oil and gas.

About this time the surface owner made leases for oil and gas purposes, and the lessees began at once to drill. This bill was then filed by the appellant company for the purpose of obtaining an injunction against the defendants, to restrain them from further drilling wells then commenced, and from drilling any other well or wells which would pass through the coal. The bill was filed upon the allegation and belief that the defendants had no right whatever to drill the wells. The plaintiff company also claimed that it was impossible for such wells to be drilled in such a manner as to allow the removal of all the coal without exposing the mine to leakage from gas from said wells, and rendering the mine operations so hazardous to plaintiff's property and plaintiff's employees as to very greatly injure and depreciate the value of said coal property, if not wholly to destroy the value thereof.

The case was heard below upon bill, answer, and affidavits. The court, as we understand the decree, refused to grant a preliminary injunction as against any well or wells on said tract of land which at the date of the decree had been drilled by the defendant through the Pittsburgh vein of coal, and also refused to enjoin the defendant from drilling wells on

said tract at any place or places where they will not pass through said Pittsburgh vein of coal, but will pass through lower strata of coal.

The court awarded an injunction, however, as to any wells not already drilled which would pass through the Pittsburgh vein, and, in addition to the ordinary injunction bond, the decree required that the defendant should execute and deliver to the plaintiff his bond in the sum of ten thousand dollars, with two sureties to be approved by the court, conditioned that in putting down and operating any wells now in process of drilling, or which may hereafter be drilled under this decree, said defendant shall protect said coal and property of said plaintiff, and also the plaintiff's employees in and about said coal from all damages by reason of said wells, and that they will use the best methods, devices, and appliances in the construction and operation of such wells; and that before said wells are abandoned he shall securely plug the same above each oil and gas bearing sand.

Subsequently the decree was modified so as to remove the injunction from the two wells now commenced, but which have not gone down through the Pittsburgh coal vein on defendant's giving bond as before stated.

The learned judge below justified his decision, as we learn from his opinion in another case heard before him and involving substantially the same questions, upon the ground that the owner of the surface has a right of way by necessity through the coal to reach his oil and gas lying beneath it; but he concedes that to make such right available, it would require a large modification of the rules in relation to a right of way by necessity over the surface. "Yet," to use his own language, "my present impressions are that it can and should be sustained in a reasonable manner, having due regard for the interest and rights of both parties. But it cannot be permitted to an extent that will destroy the grant of the coal, nor even to seriously depreciate it without ample compensation. The owner of the surface cannot bore where he pleases nor as often as he pleases. The right of designating the reasonable location of the one right of way by necessity, which the law recognizes, has always been held to be in the owner of the land. If he refuses to designate such way, then the owner of the right of way can designate it, or can apply to the court to have it located."

This is a new question, and one that is full of difficulty.

The discovery of new sources of wealth, and the springing up of new industries which were never dreamed of half a century ago, sometimes present questions to which it is difficult to apply the law as it has heretofore existed. It is the crowning merit of the common law, however, that it is not composed of ironclad rules, but may be modified to a reasonable extent to meet new questions as they arise. This may be called the expansive property of the common law. Mining rights are peculiar, and exist from necessity, and the necessity must be recognized, and the rights of mine and landowners adjusted and protected accordingly. We have an illustration of this in *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126, 57 Am. Rep. 445.

The mining of coal and other minerals is constantly developing new questions. Formerly a man who owned the surface owned it to the center of the earth. Now the surface of the land may be separated from the different strata underneath it, and there may be as many different owners as there are strata: *Lillibridge v. Lackawanna Coal Co.*, 143 Pa. St. 293; 24 Am. St. Rep. 544. The difficulty is to so apply the law as to give each owner the right of enjoyment of his property or strata without impinging upon the right of other owners, where the owner of the surface has neglected to guard his own rights in the deed by which he granted the lower strata to other owners.

In the earlier days of the common law the attention of buyers and sellers, and therefore the attention of the courts, was fixed upon the surface. He who owned the surface owned all that grew upon it, and all that was buried beneath it. His title extended upward to the clouds and downward to the earth's center. The value of his estate lay, however, in the arable qualities of the surface, and, with rare exceptions, the income derived from it was the result of agriculture. The comparatively recent development of the sciences of geology and mineralogy, and the multiplication of mechanical devices for penetrating the earth's crust, have greatly changed the uses and the values of lands. Tracts that were absolutely valueless, so far as the surface was concerned, have come to be worth many times as much per acre as the best farming lands in the commonwealth, because of the rich deposits of coal, or iron, or oil, or gas known to underlie them at various depths. These deposits are sometimes found, however, beneath well cultivated farms, so that the surface has a

large market value apart from the value of the deposits of coal or other minerals under it. In such cases the owner is rarely able to utilize the lower stores of wealth to which he has title, by mining operations conducted by himself, and for this reason he sells them to some person or corporation to be mined and to be moved. So it often happens that the owner of a farm sells the land to one man, the iron, or oil, or gas to another, giving to each purchaser a deed, or conveyance in fee simple for his particular deposit or stratum, while he retains the surface for settlement and cultivation precisely as he held it before. The severance is complete for all legal and practical purposes. Each of the separate layers or strata becomes a subject of taxation, of encumbrance, levy, and sale, precisely like the surface. As against the owner of the surface each of the several purchasers would have the right, without any express words of grant for that purpose, to go upon the surface to open a way by shaft, or drift, or well, to his underlying estate, and to occupy so much of the surface, beyond the limits of his shaft, drift, or well, as might be necessary to operate his estate, and to remove the product thereof. This is a right to be exercised with due regard to the owner of the surface, and its exercise will be restrained, within proper limits, by a court of equity if this becomes necessary; but subject to this limitation it is a right growing out of the contract of sale, the position of the stratum sold, and the impossibility of reaching it in any other manner. So far, our way is clear of difficulty because the several owners of the mineral deposits are exercising their right to have access to their respective estates against their vendor. Our question is over the right of the vendor to reach strata underlying a stratum which he has conveyed to another. Having sold the coal underlying the surface, is he to be forever barred from reaching his estate lying beneath the coal? Prior to the sale of the coal his estate, as before observed, reached from the heavens to the center of the earth. With the exception of the coal his estate is still bounded by those limits. It is impossible for him to reach his underlying estate, except by puncturing the earth's surface and going down through the coal which he has sold. While the owner of the coal may have an estate in fee therein, it is at the same time an estate that is peculiar in its nature. Much of the confusion of thought upon this subject arises from a misapprehension of the character of this estate. We must regard it from a busi-

ness, as well as a legal, standpoint. The grantee of the coal owns the coal but nothing else, save the right of access to it and the right to take it away. Practically considered, the grant of the coal is the grant of a right to remove it. This right is sometimes limited in point of time; in others it is without limit. In either event it is the grant of an estate determinable upon the removal of the coal. It is, moreover, a grant of an estate which owes a servitude of support to the surface. When the coal is all removed the estate ends for the plain reason that the subject of it has been carried away. The space it occupied reverts to the grantor by operation of law. It needs no reservation in the deed, because it was never granted. The grantee has the right to use and occupy it while engaged in the removal of the coal, for the reason that such use is essential to the enjoyment of the grant. It cannot be seriously contended that after the coal is removed the owner of the surface may not utilize the space it had occupied for his own purposes, either for shafts or wells, to reach the underlying strata. The most that can be claimed is that, pending the removal, his right of access to the lower strata is suspended. The position that the owner of the coal is also the owner of the hole from which it has been removed, and may forever prevent the surface owner from reaching underlying strata, has no authority in reason, nor do I think in law. The right may be suspended during the operation of the removal of the coal to the extent of preventing any wanton interference with the coal mining; and for every necessary interference with it the surface owner must respond in damages. The owner of the coal must so enjoy his own rights as not to interfere with the lawful exercise of the rights of others who may own the estate, either above or below him. The right of the surface owner to reach his estate below the coal exists at all times. The exercise of it may be more difficult at some times than at others, and attended with both trouble and expense.

No one will deny the title of the surface owner to all that lies beneath the strata which he has sold. It is as much a part of his estate as the surface. If he is denied the means of access to it he is literally deprived of an estate which he has never parted with. In such case the public might be debarred the use of the hidden treasures which the great laboratory of nature has provided for man's use in the bowels of the earth. Some of them, at least, are necessary to his com-

fort. Coal, oil, gas, and iron are absolutely essential to our common comfort and prosperity. To place them beyond the reach of the public would be a great public wrong. Abounding, as our state does, with these mineral treasures, so essential to our common prosperity, the question we are considering becomes of a *quasi* public character. It is not to be treated as a mere contest between A. and B. over a little corner of earth. We have already seen that when the owner of the surface parted with the underlying coal he parted with nothing but the coal. He gave no title to any of the strata underlying it, and it is not to be supposed for a moment that the grantor parted with or intended to part with his right of access to it. We are of opinion that he has such right of access. The only question is, how that right shall be exercised, by what authority, and under what limitations.

While there is some analogy between such right and the common-law right of way of necessity over the surface, we quite agree with the learned judge below, that it would require a large modification of the common-law rule. We do not see our way clear to apply the doctrine of a surface right of way of necessity to the facts of this case. While the right of the surface owner to reach, in some way, his underlying strata is conceded, it involves too many questions affecting the rights of property, and of injury to the underlying strata, to be settled by the judiciary. It is a legislative rather than a judicial question. It needs, and should promptly receive, the interposition of the legislative authority. That body is now in session, and we have no doubt its wisdom will enable it to dispose of this somewhat difficult question in such manner as to protect the rights of the surface owner, and yet do no violence to the rights of others to whom he has sold one or more of the underlying strata. With the right conceded, there can be no serious difficulty in the lawmaking power affording a proper remedy. That remedy should be carefully guarded. The owner of the underlying strata should not be permitted, at his mere will and pleasure, to interfere with strata lying above him. All this requires an amount of legal machinery that a court of equity cannot supply, however wide its jurisdiction and plastic its process. In all such cases there should be a petition to the court, and a decree regulating the mode of exercise of the right. There should also be a provision for the appointment of a jury of view to assess the damages. In

this way the rights of the surface owner can be preserved without any wrong to the owner of the coal.

While we do not fully sustain the reasons given by the learned judge below, we will not interfere with this decree for another reason. The plaintiff company has not yet sustained any irreparable injury by reason of the sinking of these wells, and it may never do so. We find ourselves upon a new road, without chart or compass to guide us, and we propose to move slowly. The appellants have appealed to us as chancellors, and even if we concede their right to be clear, it does not follow that as chancellors we will enforce it. The effect of doing so would be to leave the owner of the surface at the absolute mercy of the owner of the coal. It is true, he can buy the coal of the latter, but only on the terms dictated by the owner. To grant the injunction as claimed by the appellant would be to destroy the estate of the surface owner in the minerals below the coal. If this were the only case of the kind in the state we might, perhaps, modify our views to some extent, but when we reflect upon the fact that many other similar cases exist, and that a vast quantity of the leased coal lands in the western part of the state are underlaid with oil and gas, precisely as in the case in hand, we cannot close our eyes to the fact that vast interests may be affected by our decree, and great injury done to the rights of others. It is familiar law, too familiar to need the citation of authority, that the decree of a chancellor is of grace, not of right, and that he is not bound to make a decree which will do far more mischief, and work far greater injury, than the wrong which he is asked to redress.

For these reasons we will not disturb the decree of the court below. The appellant company has its remedy at law, and to that we will remit it.

The decree is affirmed, and the appeal dismissed at the costs of the appellants.

Mr. JUSTICE WILLIAMS delivered a concurring opinion in which he said: "I concur in the decree made in this case and in the opinion which so ably vindicates it, but I would go further. I would lay down the broad proposition that the several layers or strata composing the earth's crust are, by virtue of their order and arrangement, subject to reciprocal servitudes; and as these are imposed by the laws of nature, and are indispensable to the preservation and enjoyment of

the several layers or strata to and from which they are due, the courts should recognize and enforce them. As it now stands the decree of this court recognizes the existence of a right of access existing in the nature of things, wholly independent of all statutory enactments, and yet refuses to enforce that right or regulate its exercise. It says to the owner of the lower estate: 'You have an undoubted right of access to the layer of the earth's crust in which your wealth lies, but equity will not protect or aid you in its exercise. The owner of the intermediate stratum may sue you and recover damages from you for doing what it is your right to do, and a chancellor cannot hear your complaint or lift his hands to protect you until the legislature has provided him with ears and hands for that purpose.' I would hold that the jurisdiction is as clear as the right of access; that the parties are in a court competent to deal with the whole subject, and that the decree of the court below should be affirmed for that reason and at the cost of the appellant."

Mr. JUSTICE GREEN and Mr. JUSTICE McCOLLUM fully concurred in this opinion.

MINING RIGHTS: See *Lillibridge v. Lackawanna Coal Co.*, 143 Pa. St. 293, 24 Am. St. Rep. 544, and especially the extended note to that case where the rights of the parties under a grant of the minerals on a tract of land are discussed.

KOELSCH v. PHILADELPHIA COMPANY.

[182 PENNSYLVANIA STATE, 855.]

NEGLECT — DUTY OF NATURAL GAS COMPANY. — A natural gas company must not only construct and maintain its pipes and fittings of such material and workmanship, laid in the ground with skill and care, as to provide against the escape of gas therefrom when new, but such a system of inspection must be maintained as will insure reasonable promptness in the detection of all leaks that may occur from the deterioration of the material in the pipes or from any other cause within the circumspection of men of ordinary skill in the business.

NEGLECT — EVIDENCE OF — EXPLOSION OF GAS. — An escape of gas from a pipe is, in the absence of any exculpatory explanation, some evidence of negligence on the part of the gas company, and when to this is added evidence that the day after an explosion, and while the company was uncovering its main pipe in the street near the premises, gas was seen to escape from the trench; that holes or cracks were found in the pipe, one of which had the appearance of being a rust hole, from which the gas poured in dense volumes; and that the street between such leak and the premises damaged was made ground, so porous that gas could pass

through it. This establishes a *prima facie* case of negligence against the company, and justifies a finding that the gas which exploded escaped from its main pipe, and that such pipe was either defective when put in place or had been in use so long that the company ought to have known that it was unsafe to use it longer.

NEGLIGENCE OF GAS COMPANY — INJURY TO GAS PIPE FROM SEWER CONSTRUCTION — DUTY OF GAS COMPANY. — When the construction of a city sewer may naturally and probably result in injury to a gas main from the settling of the ground around it, and the gas company has, or ought to have, knowledge of the construction of the sewer, it must guard against the damage likely to result therefrom, and cannot shift the responsibility upon the city or its contractor. When in such case injury results from an explosion caused by a leak of gas, it is for the jury to determine whether or not a gas company maintaining a proper system of inspection would or ought to have knowledge, from the notoriety attending the construction of the sewer, within a shorter time than elapsed between the commencement thereof and the discovery of the leak of gas.

CONCURRENT NEGLIGENCE — GAS EXPLOSION CAUSED BY STRANGER — RIGHT OF RECOVERY. — When the presence of gas in a cellar is due to the negligence of a gas company, and an explosion results from the negligent striking of a match by a stranger, the party injured may recover against either the gas company or the stranger, or against both, at his election.

TRESPASS to recover for an injury to plaintiff and his wife and minor child, and for the destruction of his house caused by an explosion of gas. Judgment in favor of plaintiff for five thousand dollars, and the defendant appealed.

George B. Gordon, John Dalzell, and William Scott, for the appellant.

A. Israel and Josiah Cohen, for the appellee.

HEYDRICK, J. That the plaintiff's house was supplied by the defendant with natural gas for fuel through a service pipe connected with a main pipe in the adjacent street, and that it was wrecked, and the plaintiff and several members of his family seriously injured — one of them fatally — by an explosion of such gas which had accumulated in the cellar of the house, are undisputed facts. It is alleged by the plaintiff that the gas which had so accumulated in his cellar, and there exploded, was negligently permitted by the defendant to escape through a leak in its main pipe near to his house, and found its way thence through the loose shale and broken rock, of which the street at that point was formed, and a rudely constructed sewer or drain, to the place of the explosion. The defendant denies that the gas escaped from its main, and did or could find its way through the material, of which the street was composed, in the manner described, but alleges that it

escaped through a leak in the plaintiff's own pipe, for the existence of which he alone was responsible. It further denies that, if the gas did escape through a leak in its main, it is chargeable with negligence in respect to the existence of that leak; and contends earnestly that no such evidence was produced by the plaintiff upon the points in controversy as ought to have been submitted to the jury.

The testimony of George Walters, if believed, would warrant a finding that the gas did not escape from the plaintiff's service pipe. According to his statement he tested that pipe between the time of a slight explosion in the kitchen in the morning, and the greater explosion in the cellar, by which the house was wrecked at ten o'clock the same forenoon, by "lighting a match and running it along the pipe," and found no leak. If he was entitled to belief, his test was made in the same manner that the defendant's experienced servant made his most crucial test of the pipes in the kitchen and upper rooms immediately before the explosion, and it would seem improbable that if a leak in the pipe in the cellar existed it could have escaped detection. Whether the testimony of the defendant's witnesses to the effect that the service pipe was found after the explosion to be broken off, and that part of the break appeared old and part new or fresh, indicating that there had been an old crack through which gas might have escaped, followed by an entire severance by the force of the explosion, ought to have overborne Walter's testimony, by casting discredit upon either his truthfulness or the thoroughness of his test, was a question wholly for the jury.

If the gas which exploded in the cellar did not escape from the plaintiff's supply pipe, whence did it come? That was a question to be answered by the plaintiff, and he seems to have answered it conclusively, if the testimony of his witnesses can be relied upon. He adduced testimony to the effect that on the day after the explosion, and the following day, the defendant uncovered its main pipe in the vicinity of his premises; that before it was fully uncovered, but after the digging had commenced, gas was seen to escape from the trench — to use the language of an intelligent witness, "there was some evidence of trouble of that kind before the ground was entirely uncovered from the fact that there was something like a mist or haze arising from the ground before they reached the pipe, something like vapor," and that when the pipe was reached at a point about thirty-six feet distant from the house, two or

more holes or cracks were found in it, one of them having "the appearance of being rusted, worn out," through which the gas poured in such dense volume that it could be seen, and with such force that it could be heard at the distance of from fifty to seventy-five feet. He further showed that the street from the point where the leaks were found to a point opposite his house was "made ground"; that is to say, that a depression in the natural surface had been filled with loose shale and broken rock over which clay had been spread, and compacted by the travel upon it, and that he had constructed an underground drain from his cellar to a point in the street near the gas main where it discharged its drainage in the loose material beneath the surface. His evidence further tended to show that the shale and rock filling of the street was so porous that gas could pass through it from the leaks in the defendant's main to the end of his drain, and that there was nothing to obstruct its passage thence to the place of the explosion, which was somewhat higher than the street.

Assuming that George Walter's testimony, that there was no leak in the plaintiff's supply pipe, was true, and, in the absence of evidence or allegation that there was any other source from which the gas could have reached the plaintiff's cellar, the inference from the facts proved is irresistible that it came from the leaks in the defendant's main. If the plaintiff's testimony be believed, the loose shale and broken rock of the street, covered with clay and that compacted by the travel upon it, formed the equivalent of a pipe connecting the leaks in the gas main with the underground drain from the cellar, through which the gas might, and, as the cellar was higher than the street, naturally would, pass. There was, therefore, sufficient evidence to justify the jury in finding that the gas which exploded had escaped from the defendant's main.

The next question is, was there sufficient evidence to charge the defendant with negligence with respect to the leaks in its pipe? The definitions of negligence which have been attempted imply that a higher degree of care and vigilance is required in dealing with a dangerous agency than in the ordinary affairs of life or business, which involve little or no risk of injury to persons or property. While no absolute standard of duty in dealing with such agencies can be prescribed, it is safe to say in general terms that every reasonable precaution suggested by experience and the known dangers of the subject

ought to be taken. This would require in the case of a gas company not only that its pipes and fittings should be of such material and workmanship, and laid in the ground with such skill and care as to provide against the escape of gas therefrom when new, but that such system of inspection should be maintained as would insure reasonable promptness in the detection of all leaks that might occur from the deterioration of the material of the pipes, or from any other cause within the circumspection of men of ordinary skill in the business. Something like this was said in *Kibele v. Philadelphia*, 105 Pa. St. 41, and in *Holly v. Boston Gas Light Co.*, 8 Gray, 123, 69 Am. Dec. 233, and *Smith v. Boston Gas Light Co.*, 129 Mass. 318, and the principle is recognized in many kindred cases. It requires nothing unreasonable; it does not require that the company shall keep up a constant inspection all along its lines without reference to the existence or nonexistence of probable cause for the occurrence of leaks or escape of gas, and is not in conflict with *Hutchinson v. Boston Gas Light Co.*, 122 Mass. 219, relied upon by the defendant. There the escape of gas complained of was the result of an overwhelming calamity that laid a great part of the city of Boston in ashes, and fractured and severed the company's pipes in so many places that all the force it could employ could not guard against all possible consequences of the escape of gas immediately, without shutting off the supply from the whole city, and this it was excused from doing on the ground that more mischief would result therefrom than was likely to result from the neglect so to do.

The escape of gas from the defendant's main was, in the absence of any exculpatory explanation, some evidence of neglect: *Smith v. Boston Gas Light Co.*, 129 Mass. 318. And when to this was added the testimony already quoted of one of the plaintiff's witnesses, in respect to the appearance of the aperture through which it escaped, a *prima facie* case was made out against the defendant. The jury would have been justified in finding either that the pipe was defective when put in place, or that it had been in use so long that the defendant ought to have known that it was unsafe to use it longer, if no explanation of its condition, actual or apparent, had been given. The defendant's witnesses described an opening in the pipe different from that described by at least one of the plaintiff's witnesses, and said it was caused by the pulling of the pipe out of joint, and undertook to account for the separation

of the joints by the fact that a sewer had recently been constructed in the street, in close proximity to the pipe, and inferred that the ground had settled and allowed the pipe to sink in places, thereby putting a strain upon it. Their inference was valueless, unless the fact inferred was the natural and probable consequence of the construction of the sewer. If such injury to a gas main be a natural and probable consequence of the construction of a sewer in close proximity to it, and the defendant had knowledge, or ought to have had knowledge of the construction of this particular sewer, it was its duty to efficiently guard against the damage that was likely to be sustained: *Kibels v. Philadelphia*, 105 Pa. St. 41. It could not shift the responsibility upon the municipality or its contractor: *Oil City Gas Co. v. Robinson*, 99 Pa. St. 1. And it was for the jury to determine whether, from the notoriety attending the construction of a sewer, a gas company having a proper system of inspection would or ought to have knowledge within a shorter time than elapsed between the commencement of work upon the sewer in question and the discovery of the leak.

It is further contended that although the defendant may have negligently permitted the gas to escape from its main into the plaintiff's cellar, that negligence was not the proximate cause of the explosion, and that if George Walters, and not its servant sent to examine the premises, lighted the match, it is not responsible. Under the facts of this case it is immaterial whether Walters or Householder, the defendant's servant, struck the match. The concurrence of the presence of the gas and the lighting of the match, the negligence of the defendant with that of Walters, was necessary to and did cause the explosion. In such cases the injured party has his redress against either of the wrongdoers, or both, at his election, except where goods or passengers are injured through the concurrent negligence of a common carrier and a third person: *Borough of Carlisle v. Brisbane*, 113 Pa. St. 544; 57 Am. Rep. 483.

The judgment is affirmed.

GAS COMPANIES. — DUTY WITH REGARD TO LAYING PIPES, and liability for damages caused by explosions of escaping gas. This subject is discussed in *Mississinewa Min. Co. v. Patton*, 129 Ind. 472; 28 Am. St. Rep. 203, and especially the note where the cases on this subject are collected. For a further discussion see extended note to *Shepard v. Milwaukee Gas etc. Co.*, 70 Am. Dec. 488, 489.

JACKSON v. PITTSBURGH TIMES.

[152 PENNSYLVANIA STATE, 403.]

LIBEL — CRITICISM OF CONDUCT OF PUBLIC OFFICER. — A public officer engaged in a public service is amenable to public criticism in a newspaper without liability for libel when there is probable cause for comment, and no proof of express malice, even though the statement published is not true in all respects.

LIBEL — PRIVILEGED COMMUNICATION — MALICE, WHEN QUESTION OF LAW AND WHEN OF FACT. — It is matter of law for the court to determine whether or not the occasion of writing or publishing criminary language, which would otherwise be actionable, repels the inference of malice, constituting it a privileged communication, and if there is no intrinsic or extrinsic evidence of malice, it is the duty of the court to direct a nonsuit or verdict for the defendant. If the communication contains expressions which exceed the limits of privilege, such expressions are evidence of malice, and the case should be given to the jury.

LIBEL — PRIVILEGED COMMUNICATION — MALICE — INSTRUCTIONS. — When in an action for libel it appears that the publication complained of is an exaggerated and sensational account of a militia officer's conduct while drunk, and constitutes a libel unless justified by the occasion, an instruction that such publication is libelous, and that "the style and tone of the narrative exaggerate and magnify the alleged fault of the plaintiff, and is evidence of malice," which entitles him to a verdict, unless the publication contains a substantially fair and true account of what happened, or the defendant had reasonable and probable cause to believe the statement true, and made proper inquiry, and used care in what he said, believing it to be true, is not erroneous.

LIBEL — GOOD FAITH OF PUBLICATION — EVIDENCE. — In an action for libel based on the publication of an exaggerated and sensational account of a military officer's conduct while drunk, evidence that the military authorities brought charges against the plaintiff for his conduct, and that the inspection roll of his company showed that he was under arrest after the date of the publication, is admissible in support of good faith in making the publication, although such charges and entry on the inspection roll were made subsequent to the main transaction.

LIBEL — COMMENT OF COURT. — In an action for libel based on an exaggerated account of a militia officer's conduct when drunk, a statement by the court in the presence of the jury that "they could not see how an officer could be more degraded than to be under the influence of liquor while on duty," is within the bounds of just judicial comment, when justified by the evidence.

LIBEL — DISCRETION OF COURT — SENDING OUT LIBELOUS ARTICLE WITH JURY. — In an action for libel it is not error for the court to refuse to send out the libelous publication with the jury when it retires to deliberate, especially when it does not appear that the court was requested to do so.

ACTION for libel based upon the following publication in a newspaper.

"A DISGRACED OFFICER.

**"LIEUT. JACKSON IN A DRUNKEN FURY HAS A DESPERATE STRUGGLE WITH
A DEPUTY WHO REFUSES TO PASS HIM.**

"Branch Office of the Pittsburg Times, Johnstown, June 5.

"Down the Cambria road, past which the dead of the river Conemaugh swept into Ninevah in awful numbers, there was another scene to-day, that of a young officer of the National Guard, in full uniform, and a poor deputy sheriff, who had lost home, wife, children, and all, clinched like madmen and struggling for the former's revolver. If the officer of the guard had won there might have been a tragedy, for he was drunk. The homeless deputy sheriff, with his wife and babies swept to death past the place where they struggled, was dead sober and in the right. The officer of the National Guard was First Lieutenant Joseph Jackson, Company G, Fourteenth Regiment. His company came with that regiment in this hour of distress to protect survivors from ruffianism and maintain the peace and dignity of the state. The man with whom he fought for the weapon was Peter Fitzpatrick, almost crazy in his own woe, but singularly cool and self-possessed regarding the safety of those left living. It was one o'clock this afternoon when the Times correspondent noticed on the Cambria road the young officer with his long military coat cut open, leaning heavily for support upon two privates of Company I, Hawthorne and Stewart (boys). He was crying, in a maudlin way, 'You just take me to a place and I'll drink soft stuff.' They entreated him to return to the regimental quarters, even begged him, but he cast them aside and went staggering down the road to the line, where he met the grave-faced deputy face to face. The latter looked into the white of his eyes and said:—

"'You can't pass here, sir.'

"'Can't pass here!' he cried, waving his arms. 'You challenge an officer. Stand aside.'

"'You can't pass here,' this time as quietly. 'Not while you're drunk.'

"'Stand aside,' he yelled. 'Do you know who I am? You talk to an officer of the National Guard.'

"'Yes, and listen,' said the man in front of him, so imperatively that it hushed his tirade, 'I talk to an "officer" of the National Guard; I who have lost my wife, my children, and all in this flood no man has yet described; we who have seen our dead with their bodies mutilated and their fingers cut

from their hands by dirty foreigners for a little gold, are not afraid to talk for what is right, even to an officer of the National Guard.'

"While he spoke another great, dark, stout man, who looked as though he had suffered, came up, and, upon his taking in the situation, every vein in his forehead swelled purple with rage.

"'You dirty cur,' he cried to the officer, 'you dirty drunken cur, if it wasn't for the sake of peace I'd lay you out where you stand.'

"'Come on,' yelled the Lieutenant with an oath.

"The big man sent out a terrible blow that would have left him senseless, had not one of the privates dashed in between, receiving part of it and warding it off. Lieutenant Jackson got out of his military coat. The privates seized the big man and with another newspaper correspondent who ran to the scene, held him back. The Lieutenant put his hand to his pistol pocket, then Deputy Fitzpatrick seized him and the struggle for the weapon began. For a moment it was fierce and desperate, then another private came to the deputy's assistance. The revolver was wrested from the drunken officer, and he himself was pushed back, panting, to the ground. Deputy Fitzpatrick seized the military coat he had thrown on the ground, and with it and the weapon started to the regimental headquarters. Then the privates got around him and begged him, one of them with tears in his eyes, not to report their officer, saying that he was a good man when he was sober. He studied a long while, standing in the road, while the officer slunk away over the hill. Then he threw the disgraced uniform to them and said: 'Here, give it to him; and mind you, if he does not go at once to his quarters, I'll take him there, dead or alive.'"

"THE DISGRACED SOLDIER.

"HE DEMANDS AND IS GRANTED AN INVESTIGATION — IF FOUND GUILTY, HE WILL BE SEVERELY PUNISHED.

"Branch Office of the Pittsburg Times, Johnstown, June 6.

"Lieutenant Jackson has had his sword taken from him and he is put off all duty. Concerning the matter Colonel Perchment, of the Fourteenth Regiment, said to-day:—

"Lieutenant Jackson asks for an investigation here, and I have agreed to hold one to-morrow at headquarters at 8.30 A. M. The Lieutenant says he can clear himself. If he can clear himself here, no charges for court-martial will be preferred

against him. However, if he is guilty, I will punish him to the full extent of the law."

"JACKSON UNDER ARREST.

"THE DISGRACED PITTSBURGH OFFICER DEPRIVED OF HIS SWORD AND SENT HOME AFTER INVESTIGATION — COURT-MARTIAL OR RESIGNATION.

"Branch Office of the Pittsburg Times, Johnstown, June 7.

"First Lieutenant Joseph Jackson, Company G, Fourteenth Regiment, goes to Pittsburg under arrest. There he will either report for court-martial or withdraw from his command. This was ordered by Colonel Perchment to-day, after hearing the evidence of F. Jennings Crute and Richard H. Davis, the two correspondents of the Times, who witnessed the whole of his disgraceful conflict while he was drunk and in full uniform on Wednesday with the poor deputy on the Cambria road who had lost his family and home in the flood. The officer's escapade is considered among military men here, happening under the circumstances it did, as an insult to the whole National Guard of Pennsylvania that cannot be too quickly reeented.

"The officer of the Colonel's staff who crossed the river and summoned the correspondents in their tent last night met them at the regimental picket lines this morning and escorted them to Colonel Perchment's private car, where he and Lieutenant-colonel Graham were in waiting with a number of newspaper men and officers of the regiment. The patrols to the desolate districts were just going out of camp and could be seen marching down through the valley in the distance, while the guards already held the river passes and Company G filed by with the second lieutenant in command. The testimony was taken by Surgeon D. G. Foster, who wrote on the top of his bunk and administered the military oath,—

"'You do solemnly swear in the presence of Almighty God that your statement shall be true and one for which you are ready to answer on the last day.'

"Mr. Crute's dispatch to the press was sworn to and accepted as evidence, as printed in the Times.

"Mr. Davis also witnessed the affair, and testified that he and a soldier held the citizen, who, seeing the officer was preparing to fight, was eager to renew the attack.

"Lieutenant Jackson was not present. He had scoured around and gotten several women on the river road to say he wasn't drunk. Colonel Perchment heard their statements, and taking the evidence ordered the officer under arrest.

Speaking of the officer the Colonel said: 'Lieutenant Jackson will either have to stand a court-martial or resign his commission. One thing is certain, he can't remain in the regiment.'

On the trial the defendant offered in evidence certain charges and specifications preferred against the plaintiff by reason of his drunken conduct. He also offered in evidence the inspection roll of the plaintiff's company, showing that from the time of the publication to a time considerably subsequent thereto he was absent under arrest. This evidence was admitted over the objection of plaintiff.

Judgment for defendant and plaintiff appealed.

W. D. Moore, T. M. Marshall, and F. C. McGirr, for the appellant.

George O. Wilson, for the appellee.

GREEN, J. The learned court below committed the whole case to the jury, both in the general charge and in the answers to points, and the jury found a verdict in favor of the defendant.

The court distinctly said several times that the matter contained in the publications in controversy was libelous, and the plaintiff would be entitled to a verdict unless the jury found that the publications contained a substantially fair and true account of what had happened, or that the defendant had reasonable and probable cause to believe the statements true after proper inquiries made. The court said further: "On the other hand, if you do not find either of these points, the plaintiff would be entitled to a verdict, because then it would be unjustifiable, and would be a libel. If you find that they were not justified on either of these grounds, then the next question is the measure of damages." It is difficult to understand what more the court could have done. The case was necessarily for the jury. The court could not direct them absolutely to return a verdict for the plaintiff, and were not asked to do so. They could not affirm the plaintiff's first point, and say without qualification that "the words and language used in describing the occurrence are not justified by the evidence, and a verdict should be rendered for the plaintiff," because the jury were to judge whether the words used were or were not justified by the evidence. The great trouble with the plaintiff's case is, that in the substantial particulars of the narration, "the words and language used in describing the occurrence" were justified

by the evidence. The plaintiff was at the time a public officer, actually on duty in performing a very grave and serious public service. Such persons are amenable to public criticism in the newspapers, without liability for libel, if there was probable cause for their comments and no proof of express malice, even though the statements are not strictly true in all respects: *Briggs v. Garrett*, 111 Pa. St. 404; 56 Am. Rep. 274; *Neeb v. Hope*, 111 Pa. St. 145; *Press Co. v. Stewart*, 119 Pa. St. 584. In the first case, we said: "A communication to be privileged must be made upon a proper occasion, from a proper motive, and must be based upon reasonable or probable cause. When so made in good faith, the law does not imply malice from the communication itself, as in the ordinary case of libel; actual malice must be proved before there can be a recovery. . . . An action for libel is upon all fours with an action for malicious prosecution. The latter is but an aggravated form of an action for libel, as in it the libel is sworn to before a magistrate. The cases make no distinction between them." In the course of the opinion by the present chief justice, numerous authorities are cited in support of his conclusions. Among them are the following: "If fairly warranted by any reasonable occasion or exigency, and honestly made, the communication is protected for the common convenience and welfare of society. . . . I conceive the law to be that, though that which is spoken or written may be injurious to the character of the party, yet if done *bona fide*, as with a view to the investigation of a fact in which the party is interested, it is not libelous: Lord Ellenborough in *Delany v. Jones*, 4 Esp. 191. If there is probable cause, it is of no consequence that the libel was malicious. . . . In case of a privileged communication, probable cause is a bar to the suit: *Chapman v. Calder*, 14 Pa. St. 365."

In *Press Co. v. Stewart*, 119 Pa. St. 584, we said: "The defendant filed what was substantially, though not perhaps in strict technical form, a plea of justification. It alleges that the article in the 'Press' was a just and true account of the interview between its reporter and the plaintiff, and asked the court to instruct the jury that 'if they believed that the publication complained of is a fair and true account of an interview had between the plaintiff and Mr. Cooke, your verdict must be for the defendant.' The court declined to affirm this point, and herein we think the learned judge erred."

In *Neeb v. Hope*, 111 Pa. St. 145, our late brother Trunkey said in the opinion: "It is a matter of law for the court to determine whether the occasion of writing or speaking criminary language, which would otherwise be actionable, repels the inference of malice, constituting what is called a privileged communication; and if there is no intrinsic or extrinsic evidence of malice, it is the duty of the court to direct a nonsuit or verdict for the defendant. If the communication contains expressions which exceed the limits of privilege, such expressions are evidence of malice, and the case shall be given to the jury."

This is precisely what the learned court below did in the present case. They refused the fourth point of the defendant, which asked for a binding instruction for the defendant, and affirmed the defendant's three other points, which are couched in almost the exact language of this court in the opinion above referred to; they affirmed that part of the plaintiff's second point which required an instruction that "the style and tone of the narrative exaggerate and magnify the alleged fault of the plaintiff, and is evidence of malice," and left the whole case to the jury on the two questions whether the article contained a substantially fair and true account of what happened, and whether the defendant had reasonable and probable cause to believe their statements true, and made proper inquiries and used care in what they said, believing it to be true. It seems to us that nothing more than this could have been done by the court, and that the plaintiff's real cause of complaint is with the verdict; but when it is considered that the plaintiff was, at the time of the occurrence, a public officer, engaged in the performance of a most serious public duty; that by his own confession and the testimony of his own witnesses, as well as those of the defendant, he was under the influence of liquor, having taken four drinks of whisky in a very short time, and was, when the occurrence in question took place, insisting on going back to the saloon to get another drink; that his commanding officer, when he heard of the matter, advised him to go home, which he did, and was out of the service for several months; that during all this time he was not entitled to wear his sword, having demanded a court-martial; that charges were preferred against him for his conduct by the proper military officers, which, though never tried, remained pending for a long time; and that his conduct upon the occasion in-

question was certainly not that of a prudent and sober person, it must be conceded that the jury may well have felt it to be their duty to find their verdict for the defendant. It is true that in some particulars the statements in the published articles were exaggerated and sensational in their character, after the reprehensible manner of many, though not all, of the newspapers of the present day; but the effect of that kind of comment was fairly left to the jury as evidence of malice, and it was their function to decide upon its effect in the cause. It seems to us that the testimony as to the preferment of charges and the inspection roll of the plaintiff's company was properly received in support of the statements and the good faith of the published articles, although they occurred after the main transaction. Nor do we see any error in the court's statement that it was very clear that the charges published were not all false, and that the plaintiff was in liquor, as these were really very proper deductions from testimony, much of which came from the plaintiff himself, and which was scarcely controverted; also the statement of the court that they could not see how an officer could be more degraded than to be under the influence of liquor while on duty we think was within the bounds of just judicial comment, and certainly was not error in any legal sense when the evidence is considered.

As to the twelfth assignment, we are not referred by counsel to any authority which requires the court to send out with the jury the libelous publication, especially when it does not appear that the court was asked to do so. There is nothing on the record upon this subject except the remark of the court that counsel for the defendant having asked to send out some document along with the alleged libel, and the plaintiff having objected to this, the court refused to send out either, unless requested by the jury. We see no error in this.

Upon the whole case, we think the cause was correctly tried, the court giving every opportunity to the plaintiff to get a verdict that he could ask for, and that his want of success was due to the views of the jury as expressed in their verdict rather than to errors on the part of the court.

Judgment affirmed.

LIBEL — CRITICISM OF PUBLIC OFFICER. — The character and reputation of candidates for public office are protected from malicious attack by the same rules as those of private individuals. Greater latitude is allowed in the case of the former than the latter, and beyond this the same rule applies to both:

Bellnap v. Ball, 83 Mich. 583; 21 Am. St. Rep. 622, and note. The libel of a public officer in his official character may be justified only by proving it true or by showing probable cause or reasonable grounds for believing it to be true: *Cotulla v. Kerr*, 74 Tex. 89; 15 Am. St. Rep. 819, and note. The reputation of a public officer cannot be destroyed or damaged by false publications without redress: *Bourreseau v. Detroit etc. Journal Co.*, 63 Mich. 425; 6 Am. St. Rep. 320, and note. The subject of the libel of public officers is thoroughly discussed in the extended notes to *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 349-351; *Jones v. Townsend*, 58 Am. Rep. 685-692, and *Aldrich v. Press Printing Co.*, 86 Am. Dec. 88, 89.

LIBEL — PRIVILEGED COMMUNICATION — QUESTION FOR COURT.—Whether or not a publication is privileged is a question for the court: *Cotulla v. Kerr*, 74 Tex. 89; 15 Am. St. Rep. 819; *Byam v. Collins*, 111 N. Y. 143; 7 Am. St. Rep. 726, and note. For an extended discussion of the relative functions of the court and jury in libel cases, see note to *State v. Syphrett*, 13 Am. St. Rep. 625.

WALL v. PITTSBURGH HARBOR COMPANY.

[182 PENNSYLVANIA STATE, 427.]

RIPARIAN RIGHTS — NAVIGATION — CONFLICT BETWEEN — DAMAGES. — The right of navigation on a river gives only a right to temporary moorings between high and low watermark, and any use of private property beyond that and for a permanent mooring renders the navigator a trespasser and liable in damages, although he does not inconvenience the private owner's approach to the shore, and the latter makes no use of the property.

RIPARIAN RIGHTS — NAVIGATION — CONFLICT BETWEEN — RENTAL VALUE AS ELEMENT OF DAMAGES. — When a navigator on a river commits a trespass by permanently mooring on a private shore, thus preventing the owner from renting his property, the rental value thereof is a proper and essential element of damages to be recovered for the trespass.

TRESPASS to recover for an intrusion on private property between high and low watermark. It was alleged and admitted that the defendants entered upon a part of plaintiff's property between high and low watermark on a navigable river, and placed on said premises, coal boats, barges, and flats, keeping them thereon for long spaces of time, after notice to remove them. Judgment for plaintiff and defendants appealed.

W. P. Potter and W. A. Stone, for the appellants.

C. W. and E. P. Jones, for the appellee.

STERRETT, J. The defendant company has no just reason to complain of the charge of the court below. In common with the general public, defendant had a right of navigation over plaintiff's land between high and low watermark; and, when neces-

sary to the exercise of that right, it might have made a temporary mooring; but in any use which it made beyond that it became a mere trespasser on her right of property. That the defendant's moorage was not necessary to the exercise of the right of navigation is too clear to doubt. It is immaterial that the company defendant did not inconvenience plaintiff's approach to the shore, or that she had in fact made no use of the property; for the company's right was of navigation alone, and its conduct an invasion of plaintiff's right of property, for which it was liable in damages.

The defendant complains that the rental value of the property was made an element of damages. Rent, as rent, was of course not recoverable; but surely if plaintiff was prevented from renting her property by reason of the unlawful action of defendant an injury was done for which she was entitled to compensation. The loss in rental value was a direct result, and furnished an obviously essential element of damages.

Neither of the specifications of error is sustained.

Judgment affirmed.

RIPARIAN RIGHTS — NAVIGABLE STREAMS. — A riparian owner whose lands are bounded by a navigable river has a right of access to such stream, and may recover damages from one who interferes with such access: *Rumsey v. New York etc. R'y Co.*, 133 N. Y. 79; 28 Am. St. Rep. 600, and note. Those navigating a river have no right, as incident to the right of navigation, to land upon and use the bank at other places than a public landing without the consent of the owner, as the banks of a navigable stream are private property: *Compton v. Hankins*, 90 Ala. 411; 24 Am. St. Rep. 823, and note. A riparian owner's right to build in front of his land to navigable water cannot be interfered with without compensation: *Janesville v. Carpenter*, 77 Wis. 288; 20 Am. St. Rep. 123, and note; *Grand Rapids v. Powers*, 89 Mich. 94; 28 Am. St. Rep. 276, and note; *State v. Narrows Island Club*, 100 N. C. 477; 6 Am. St. Rep. 618. See also *Lake Superior Land Co. v. Emerson*, 38 Minn. 406; 8 Am. St. Rep. 679, and note; *Fulmer v. Williams*, 122 Pa. St. 191; 9 Am. St. Rep. 88, and note.

RIPARIAN RIGHTS. — DAMAGES FOR CUTTING OFF ACCESS FROM PLAINTIFF'S LAND TO A RIVER in front thereof may be ascertained by establishing the rental value with such access, and deducting therefrom the rental or usable value after such access was cut off: *Rumsey v. New York etc. R'y Co.*, 133 N. Y. 79; 28 Am. St. Rep. 600, and note.

NORCROSS v. OTIS BROTHERS AND COMPANY.

[152 PENNSYLVANIA STATE, 481.]

DEBTOR AND CREDITOR. — ACTION FOR MALICIOUS ABUSE OF CIVIL PROCESS will not lie, unless there is falsehood in the demand, want of probable cause, malice in the defendant, and an actual arrest of the person or a seizure of property.

MALICIOUS PROSECUTION — ABUSE OF CIVIL PROCESS. — A civil suit, no matter how malicious or unfounded, cannot be made the ground for an action of malicious prosecution and the recovery of damages unless there has been an actual interference with either a person or his property.

DEBTOR AND CREDITOR — DAMAGES. — Notice by a third person to a debtor not to pay his creditor, by reason of which the latter is compelled to sue to recover the sum due him, is not sufficient ground to support an action for damages.

John F. Sanderson, Walter Lyon, and Charles H. McKee, for the appellant.

S. Schoyer, Jr., for the appellees.

PAXSON, J. We do not understand it to be disputed that the defendant corporation had a claim against Norcross Brothers, growing out of the construction of the elevators of the courthouse, in the city of Pittsburgh. Whether it was a valid claim is not material to the present inquiry. That there was such a claim appears distinctly by the agreement referred to as "Exhibit C," and bearing date the twenty-third day of November, 1887.

It further appears that the county of Allegheny was indebted to Norcross Brothers in a sum of money which was due on account of the erection and construction of the said courthouse. The plaintiffs were nonresidents of the state, and they claim that the defendant gave notice to the county not to pay them the money that was admittedly due them. What the precise terms of this notice were does not appear. It was not in writing, and we have only oral evidence of its character. In pursuance of it, however, the commissioners of the county, acting under the advice of counsel, refused to pay the balance, about six thousand eight hundred dollars, whereupon Norcross Brothers sued the county of Allegheny and recovered the amount.

This suit is brought to recover damages alleged to have been sustained by Norcross Brothers, in consequence of the alleged wrongful notice given as above stated. The jury returned a verdict for the plaintiffs in the sum of five hundred seventy-seven dollars, upon which verdict judgment was

entered in the court below. The plaintiffs' statement of their cause of action alleges that the notice referred to was given maliciously, vexatiously, and unjustly.

The only specification with which we will concern ourselves is the tenth, in which it is averred that the learned court erred in not affirming defendant's point. The point was in these words: "That under all the evidence the plaintiff is not entitled to recover."

This specification presents the broad question whether the plaintiffs have any cause of action.

While it may be true that an action will lie for a malicious abuse of civil process, yet there must be falsehood in the demand, want of probable cause, malice in the defendant, and an actual arrest of the person, or a seizure of property. Whatever may have been the rule of the common law in England prior to the time of Henry III., at the present day, and according to the law as it stands now, the bringing of an ordinary action, however maliciously and however great the want of probable cause, will not support a subsequent action for malicious prosecution: Pollock on Torts, 206. And a mere civil suit, however malicious or unfounded, cannot be made the ground for an action of damages. In *Muldoon v. Rickey*, 103 Pa. St. 110, 49 Am. Rep. 117, it was held that no action lies to recover damages for the prosecution of a civil suit, however unfounded, where there has been no actual interference with either the person or property of the defendant. The case cited was an action of ejectment, in which the declaration averred that it had been instituted maliciously and without probable cause, and that in consequence thereof the plaintiff was injured in circumstances, and was hindered and prevented from using the properties in controversy to borrow money for his business, by means whereof he was damaged, etc. This court held, reversing the court below, that the plaintiff could not recover.

In *Kramer v. Stock*, 10 Watts, 115, it was held that to sustain an action on the case for malicious prosecution it was necessary that the party should have committed an illegal act from which positive or implied damage ensued; but that, to bring an action, though there was no good ground for it, was not such an illegal act. On the other hand, where one abuses legal process, as by maliciously holding one to bail, or wantonly levies an execution for a larger sum than is due, or

after the payment of the debt, an action would lie against him, for these are illegal acts, and damage is thereby sustained.

In *Mayer v. Walter*, 64 Pa. St. 283, it was held that a mere suit, however malicious and unfounded, cannot be the ground of an action for damages if the defendant or his goods be not seized. "If," said Mr. Justice Sharswood in delivering the opinion of the court, "the person be not arrested or his property seized, it is unimportant how futile and unfounded the action may be, as the plaintiff, in consideration of law, is punished by the payment of costs."

If the law were not so, there would be no end of litigation. If the plaintiff, in an action of this kind, should fail to recover, the defendant in turn would bring a suit against him on the ground that the former suit was malicious, and so long as there was no recovery for the plaintiff, the parties could keep on suing each other until the end of time.

In this case there was neither the use nor the abuse of legal process. There was nothing but the giving of a notice. The notice had no legal effect whatever. It had not the effect of an attachment to tie up the fund, and had the money been attached by legal proceedings, it would be difficult to see how the plaintiff in the attachment could be mulcted in damages because of the failure of his attachment. That the action did not operate as a legal restraint upon the fund in question is shown by the fact that Norcross Brothers immediately brought suit against the county and recovered. Their loss was the delay of payment which was compensated by interest.

It is to be noticed that in the ingenious and able argument of the learned counsel for the appellee, but a single case is cited which it is even alleged sustains his contention. That was the case of *Patterson v. Marine Nat. Bank*, 130 Pa. St. 432, 17 Am. St. Rep. 778, where punitive damages were allowed by reason of the refusal of the bank to honor a check of a depositor upon notice of a third person that he was the owner of the fund. The case cited would have had more application if the suit had been against the third person who gave the notice instead of the bank which refused to honor the check.

We are quite sure that if there was a case in the books which even seemingly sustains the contention of the appellees the industry of their learned counsel would have discovered it. In *Potts v. Imlay*, 4 N. J. L. 330, 7 Am. Dec. 603, Chief Justice Kirkpatrick alleged that the books for four hundred years back had been searched to find an instance where an

action on the case for the malicious prosecution of a civil suit, like the one there trying, had been successfully maintained, and that it was conceded by the counsel for the plaintiff that no such case had been found. We understand, therefore, why no case has been cited in the present instance.

We are of opinion that the plaintiffs below had no cause of action, and the defendant's point should have been affirmed. Judgment reversed.

MITCHELL, J., dissented.

MALICIOUS PROSECUTION — ABUSE OF CIVIL PROCESS. — The doctrine of the principal case is denied in *Smith v. Burrus*, 106 Mo. 94; 27 Am. St. Rep. 329; *Antcliff v. June*, 81 Mich. 477; 21 Am. St. Rep. 533; *McPherson v. Runyon*, 41 Minn. 524; 16 Am. St. Rep. 727; *Pope v. Pollock*, 46 Ohio St. 367; 15 Am. St. Rep. 608, and *Brand v. Hinchman*, 68 Mich. 590, 13 Am. St. Rep. 362, in which it was held that the malicious prosecution of a civil suit without probable cause, is actionable without arrest or seizure of property. An action will lie for causing the issuance of a search warrant maliciously and without probable cause: *Boeger v. Langenberg*, 97 Mo. 390; 10 Am. St. Rep. 322, and note; or a writ of attachment: *Parks v. Young*, 75 Tex. 278. For a further discussion of this subject, see the extended notes to *McCardle v. McGinley*, 44 Am. Rep. 347, and *Williams v. Hunter*, 14 Am. Dec. 592.

FRIEND v. LAMB.

[152 PENNSYLVANIA STATE, 529.]

SPECIFIC PERFORMANCE — DISCRETION OF COURT. — A decree for specific performance is not granted as a matter of course but rests in the sound discretion of the court, and even when the agreement is perfectly good, the price adequate, and no blame attaches to the purchase, specific performance may be denied, and the parties turned over to their remedy in damages, if the transaction is inequitable and unjust in itself, or is rendered so by matters subsequently occurring.

SPECIFIC PERFORMANCE — IMPROVIDENT AND OPPRESSIVE CONTRACT BY MARRIED WOMAN. — When a married woman enters into an improvident and oppressive contract for the purchase of land at an unconscionable price and the chief inducing cause of the contract on the part of the vendee is the supposed presence of a large body of coal as represented by the vendor when such coal has been removed, specific performance of the contract will be refused.

SPECIFIC PERFORMANCE — GROUNDS FOR REFUSING. — An unconscionable price, a clouded title, any circumstance of overreaching, misrepresentation, suppression of the truth, suggestion of the false, fraud of any kind, breach of confidential relation, and many other similar causes will induce a court to refuse specific performance.

SPECIFIC PERFORMANCE — IMPROVIDENT AND OPPRESSIVE CONTRACT BY MARRIED WOMAN. — When a married woman has entered into an improvident and oppressive contract for the purchase of land at an uncon-

reasonable price and has agreed to give a mortgage on other property for a large sum to secure the first two payments under the contract, the fact that such additional security is required together with a controverted question of fact as to when possession is to be delivered to the vendee, is sufficient ground for refusing specific performance.

SPECIFIC PERFORMANCE — MARRIED WOMEN'S CONTRACTS. — When a contract entered into by a married woman for the purchase of land seems to be improvident and oppressive, her state and condition as being a married woman will be taken into consideration in determining whether or not a decree for specific performance should be made against her.

Edwin W. Smith, and Knox and Reed, for the appellant.

James S. Young and S. U. Trent, for the appellee.

GREEN, J. We are of opinion that the learned court below, rather than the master, adjudged correctly the facts and law of the present contention. It is not a case of mere legal right, and is not dependent solely upon principles which control the determination of causes of that character. The proceeding is by bill in equity, and the relief sought is the specific performance of a contract for the sale of a tract of land for the price of fifty thousand dollars. The defendant against whom the contract is proposed to be enforced is a married woman, and as only five thousand dollars of the purchase money were to be paid in cash, the sale is to be regarded as one made almost entirely upon credit, and the credit is to be secured by a mortgage for the sum of forty-five thousand dollars, in annual payments of five and seven thousand dollars respectively, with interest on all, and reaching over a period of seven years. For a man to encumber himself with such a contract would be, in all ordinary circumstances, a rash, improvident, and extremely hazardous undertaking. Nothing but a rare combination of fortunate events to occur in the very near future, capable of being foreseen by an extremely sagacious and experienced operator in speculative transactions, would justify such a contract in the ordinary judgment of men. But with a woman, especially a married woman, unless possessed of ample cash capital to meet her maturing payments, and a special skill and experience in conducting such affairs, an engagement of this character would seem to be almost entirely destructive of the least prospect of success, and improvident and oppressive to the last degree. There is no evidence in this case that Mrs. Lamb possessed any of the essential qualifications, either in capital or experience, to conduct such an enterprise to a successful conclusion. Where the money was

to come from to meet the annual payments does not appear, and the consequences of "the usual *scire facias* clause" are well enough known to indicate what would become of the property if the payments were not promptly met. We deem the contract in this case as highly improvident and rash, and most likely to result in great disaster even before the maturity of the payments, and therefore oppressive in its character. In its merely legal aspects these considerations could not be regarded, and they would not constitute a defense to an action to recover damages for its breach; but in equity the rule is very different where the application is for a specific performance of the contract. It was thus expressed by this court in *Freetly v. Barnhart*, 51 Pa. St. 279, where we said that "there is nothing better settled than that a decree for specific performance is not a matter of course, but rests in the sound discretion of a chancellor. It may be refused, therefore, notwithstanding a contract obligation, if there be circumstances rendering it inequitable, and then the party seeking it is left to his action for damages. I know of no case in which specific performance is ever decreed unless it appears to accord with good conscience that it should be so decreed, be the contract ever so specific in its terms."

To the same effect are *Weise's Appeal*, 72 Pa. St. 351; *Elbert v. O'Neil*, 102 Pa. St. 302; and *Rennyson v. Rozell*, 106 Pa. St. 407. In the last of these cases our late brother Clark said: "It is not sufficient to call forth equitable interposition of the court that the legal obligation under the contract may be perfect; if injustice would result from a decree for specific relief, the parties must be remitted to their remedies at law. Even when the agreement is perfectly good, the price adequate, and no blame attaches to the purchase, if the transaction be inequitable and unjust in itself, or rendered so by matters subsequently occurring, specific performance may be denied, and the parties turned over to their remedy in damages: *Henderson v. Hays*, 2 Watts, 148; *Remington v. Irwin*, 14 Pa. St. 143; *Freetly v. Barnhart*, 51 Pa. St. 279."

An unconscionable price, a clouded title, any circumstances of overreaching, misrepresentation, suppression of the truth, suggestion of the false, fraud of any kind, breach of confidential relation, and many other similar causes, will induce the courts to refuse specific performance. The cases and illustrations in the books are very numerous and of great variety.

In the present case, besides the improvident and oppressive

character of the contract and the coverture of the purchaser, it was alleged as a defense that it was represented to Mrs. Lamb, before the contract was made by the plaintiff or his agent, that the property was underlaid with coal. The defendant, Mrs. Lamb, testified that Mr. Miller, who conducted the negotiation for the plaintiff, said "that there was also brick shale and clay suitable for making brick, and that it was underlaid with coal. I asked the question when he spoke about the brick shale and clay, where could I get the coal? and he said, why, there is plenty of it all underneath this property." And again: "He said the property, the whole property, was underlaid with coal; I do not know whether he stated the thickness of the vein or not. Q. What did Mr. Miller say of the coal, as to its value, prior to signing the agreement? A. Mr. Miller said the land was underlaid with coal; he said it would be more valuable on that account." On cross-examination, she said she saw a coal pit on the farm, noticed the old slack piles; did not go into the coal pit. "When I saw the coal pit I presumed that some coal had been taken out at some time before. I did not at any time make any inquiry as to the quantity of coal taken out. Nothing else was said to me about this coal but what Mr. Miller told me at the first meeting in the office."

Harry Collins, a witness for the defendant, testified that he was present at an interview between Miller and Mrs. Lamb at Somer's office, in which "Miller told Mrs. Lamb that the property was underlaid with coal. He also said that the coal that was underneath the property, together with the stone, would make that as valuable property as there was anywhere in the state."

It was proved by McKelvy, a witness for the plaintiff, that the coal had been taken out years before by tenants of a former owner, and that there was no coal on the premises left, but about five or six acres which were not included in the lease to the lessees of the coal.

The master, in his treatment of this testimony, laid stress upon the fact that Miller, the plaintiff's agent, denied that he had ever represented that there was coal on the property, and held that if the representations were made, Mrs. Lamb did not rely on them, but made an examination for herself, and he expresses some doubt as to the truth of the testimony of the defendant and her witness. We do not perceive any sufficient reason for discrediting the positive testimony of Mrs. Lamb

and Collins on this subject, and as the actual presence of coal underlying all or any considerable part of the land, would naturally be a fact of the gravest importance in considering the value of the property, we feel constrained to say that even a condition of doubt upon this most serious subject would impel a chancellor to refuse specific performance. This was the conviction of the learned court below, and it is also ours. We cannot think it would be equitable to force upon any purchaser a title to seventy acres of land, at a price of fifty thousand dollars, when the supposed presence of a large body of coal which had been in fact removed may have been the chief inducing cause of the contract. Certainly the evidence should be most convincing that the purchaser knew that the coal had been removed, and made the contract without regard to its presence or absence. Instead of testimony to that effect, we have only denials of the fact that the representations were made, and these denials are a practical concession of their importance, if made. The fact that they were made is attested by two witnesses and denied by one. In such a state of the testimony it may well be doubted that even a jury in an action at law for damages for breach of the contract would award a verdict in favor of the seller, but assuredly a chancellor would decline to enforce such a contract in such a condition of the testimony, upon an unwilling purchaser. In *Holmes's Appeal*, 77 Pa. St. 50, we said: "Even if there had been no misrepresentation on Holmes's part, it would be doubtful whether a chancellor would compel specific performance against one who is ignorant of the fact." There was no testimony to the effect that Mrs. Lamb was informed that the coal had been removed, and the testimony of herself and Collins was that she was assured by the agent of her vendor that it was actually there and in large quantity.

There was also a controverted question of fact as to the time when Mrs. Lamb was to have possession of the premises, she and her witness Collins testifying that Miller agreed that she should have it immediately, and Miller denying such agreement. Mrs. Lamb testified that she declined to sign the contract with the provision in it regarding the leases, and that thereupon Miller promised that she should have immediate possession, and upon the faith of that promise she signed the paper. The preponderance of the testimony on this subject is with the defendant, and as an unsuccessful attempt to get possession was made, another element of doubt is introduced

into the case, causing additional hesitation as to the specific performance of the contract.

One of the elements of the contract was that Mrs. Lamb was to give a mortgage on other property owned by her for twelve thousand dollars to secure the first two payments. The circumstance that such a security was required, is additional proof that even the plaintiff did not regard the land itself as of sufficient value to assure the payment of the purchase money, and is another reason why a chancellor would regard the contract as oppressive and burdensome.

Treating the whole case as one between parties *sui juris*, we do not regard it as one in which a chancellor should decree specific performance. We do not discuss or decide the question whether the contract was within the legal competency of Mrs. Lamb, because it is not necessary, but we do think it proper to give some consideration to her state and condition as being a married woman, in determining whether or not a decree for specific performance should be made against her. The very recent emancipation of married women from the disabilities formerly incident to their relation, does not remove them from consideration by the courts, when questions of improvidence, hardship, and oppression, in contracts made by them, require judicial attention. In so far as these circumstances are recognized as occasions for intervention, they will be availed of in favor of married women as well as of all other persons, with the added consideration of their less protected and, comparatively speaking, more helpless condition. We are of the opinion that the case was correctly decided by the learned court below.

Decree affirmed and bill dismissed at the cost of the plaintiff.

SPECIFIC PERFORMANCE — DISCRETION OF COURT. — The specific performance of a contract in equity is a matter that rests in the sound discretion of the court. It is not a matter of absolute right to him who asks it: *Brewer v. Herbert*, 30 Md. 301; 96 Am. Dec. 582; *Wynn v. Garland*, 19 Ark. 23; 68 Am. Dec. 190, and note; *Johnson v. Hubbell*, 10 N. J. Ch. 332; 66 Am. Dec. 773; *Young v. Daniels*, 2 Iowa, 126; 63 Am. Dec. 477, and note; *Ford v. Euker*, 86 Va. 75; *Page v. Martin*, 46 N. J. Eq. 585; *Love v. Welch*, 97 N. C. 200; *New Orleans v. New Orleans etc. R. R. Co.*, 44 La. Ann. 64; *Sloan v. Williams*, 138 Ill. 43.

SPECIFIC PERFORMANCE — GROUNDS FOR REFUSING. — Specific performance will not be decreed where the contract has been obtained through fraud, misrepresentation or suppression of the truth, or where it would be inequitable to decree it: *Claypool v. Commissioners*, 132 Ind. 261; *Eaton v. Eaton*, 64 N. H. 493; *McElroy v. Maxwell*, 101 Mo. 294; *Ford v. Euker*, 86

Va. 76; *Brown v. Pitcairn*, 148 Pa. St. 387; 33 Am. St. Rep. 834, and note with the cases collected.

SPECIFIC PERFORMANCE — NECESSITY FOR PERFECT TITLE. — Specific performance of a contract for the purchase of land will not be decreed where the title is questionable: *Townshend v. Goodfellow*, 40 Minn. 312; 12 Am. St. Rep. 736, and note; *Brewer v. Herbert*, 30 Md. 301; 96 Am. Dec. 582, and note; *Jackson v. Murray*, 5 T. B. Mon. 184; 17 Am. Dec. 53; *Lewis v. Haddon*, 3 Litt. 358; 14 Am. Dec. 68; *Ross v. Grimball*, 1 T. U. P. Charlt. 268; 4 Am. Dec. 711; *Edwards v. Handley*, Hardin, 612; 3 Am. Dec. 745; *Butler v. O'Hear*, 1 Desaut. Ch. 382; 1 Am. Dec. 671; *Paulmier v. Howland*, 49 N. J. Eq. 364.

MURDOCK v. WALKER.

[152 PENNSYLVANIA STATE, 505.]

BOYCOTTING — INJUNCTION AGAINST. — Discharged union workmen will be restrained by injunction from gathering about their former employer's place of business, and from following to and from their work, nonunion workmen subsequently employed by him, and from gathering about the boarding house of such workmen, or in any manner interfering with them by means of threats, menaces, intimidation, ridicule, or annoyance, on account of their working for such employer.

BILL in equity for an injunction. Plaintiffs are job printers and employ a large number of men. The defendants are printers who belong to labor unions and were discharged by plaintiffs because they refused to work unless paid higher wages, and since their discharge have unlawfully conspired together in the manner set out in the opinion to prevent the plaintiffs from employing and retaining nonunion men in their service, thus attempting to compel plaintiffs to pay the wages demanded by union workmen and to employ only members of labor unions. The following is the opinion of the trial court from the judgment of which the defendant appealed.

"No questions seem to arise in this case which were not considered in the case of *Brace Brothers v. Evans*, decided by Judge Slagle, 35 Pitts, L. J. 899, that of *Moorhead v. Krause*, recently decided by Judge Stowe, and that of *McCandless & Kinser v. O'Brien*, August term of this court. The right of workingmen to organize into associations cannot be questioned, and the right of the members of such associations, either as individuals or as an organization, to cease work for any employer, and to use all lawful and peaceful means to induce others to refuse to work for such employer, are equally well founded; but the members of such associations have no right, by force, menaces, or threats, to attempt to prevent the mem-

bers of any other association, or men who belong to no association, from working upon such terms as they may be willing to do, nor, upon the other hand, have nonunion workmen any right to use such means to prevent the members of any association or union from working upon such terms as they may agree upon with any employer. When any number of men so conduct themselves as to commit a continuing trespass, or become a nuisance, they may be enjoined. Under the affidavits submitted, there can be no doubt that a number of the defendants with others, have been in the habit of collecting in crowds about the establishment of the plaintiffs, having followed their workmen to and from their boarding houses, and purposely interfered with them in passing along the public streets, in some instances even resorting to actual force. The purpose of those engaged in these proceedings was evidently correctly stated by one of the defendants, when, in reply to the words of one of the plaintiffs, "Our men are getting sick and tired of this," he said, "that is what we are here for, to make them sick and tired." The whole course of those actively engaged in these movements was a menace to the workmen of the plaintiffs, as well as to the public peace.

"A number of the defendants named in the bill are not shown by the affidavits to have taken any part in the acts which are complained of, and, as to all except those herein after named, the motion for a preliminary injunction is refused.

"It is ordered that a preliminary injunction issue against the defendants, T. O'Leary, Charles McCune, J. Francis, John C. Miller, Henry Freund, L. Hoskinson, John Mitchell, T. N. Crooks, John Powell, Eugene Walker, Samuel Miller, Frederick Yentsch, William F. Wetzel, David Lowry, Henry Neely, Robert Smith, August Held, V. B. Williams, Frank Lewis, and Edward Glennen, restraining them and each of them from gathering at and about plaintiff's place of business, and from following the workmen employed by plaintiffs, or who may hereafter be so employed, to and from their work, and gathering at and about the boarding places of said workmen, and from any and all manner of threats, menaces, intimidation, opprobrious epithets, ridicule, and annoyance, to and against said workmen or any of them, for or on account of their working for the plaintiffs, upon the execution by plaintiffs of a bond in proper form, with sureties to be approved by the court, in the sum of two thousand dollars."

D. F. Patterson and W. C. Stillwagen, for the appellants.

J. S. and E. G. Ferguson, and J. A. Evans, for the appellees.

PER CURIAM. This is an appeal from the decree of the court of common pleas No. 3, of Allegheny County, restraining the defendants from gathering about plaintiffs' place of business, and from following the workmen employed by plaintiffs, or who may hereafter be so employed, to and from their work, and gathering about the boarding houses of said workmen; and from any and all manner of threats, menaces, intimidation, opprobrious epithets, ridicule, and annoyance to and against said workmen or any of them, for or on account of their working for the plaintiffs.

The decree is affirmed, for the reasons given by the learned judge of the court below in his opinion, and the appeal dismissed at the costs of the appellants.

INJUNCTION AGAINST BOYCOTTING. — An injunction will issue to prevent the making and carrying of banners in front of complainant's place of business, for the purpose of preventing workmen from entering into or continuing in his employ: *Sherry v. Perkins*, 147 Mass. 212; 9 Am. St. Rep. 689, and note.

SCHNUR v. CITIZENS' TRACTION COMPANY.

[153 PENNSYLVANIA STATE, 29.]

STREET RAILWAYS — NEGLIGENCE. — **THOUGH A CHILD OF TENDER YEARS RUNS SUDDENLY UNDER A STREET CAR**, yet if the gripman was not attending to his business, and was standing on the side of the car with one hand out of the window looking towards the houses, and did not have hold of the grip or brake, and paid no attention to persons who halloed to him when they saw the danger of the child, it is proper to submit the case to the jury for them to determine whether or not the injuries suffered by the child were due to the negligence of the railway corporation.

STREET RAILWAYS. — **IT IS THE DUTY OF THE GRIPMAN** of a street railway car to keep his eyes on the track before him, and not to gaze at houses or other objects while the car is in motion; and if an accident occurs through his neglect of these duties, his employer is answerable.

ACTION to recover damages suffered from the death of plaintiff's son, six years of age, being run over by defendant's car. The child, being permitted to go down stairs from the rooms of his parents in the third story of a building, wandered into the street, and five minutes later was run over by

a cable car owned by the defendant. Verdict and judgment for the plaintiff.

George O. Wilson, for the appellant.

W. B. Rodgers and A. K. Stevenson, for the appellee.

PER CURIAM. The little boy whose untimely death resulted from the alleged negligence of the defendant company was less than six years old. Hence contributory negligence cannot be imputed to him; nor can it be imputed to his father under the evidence. The sole question, then, for determination is, whether the defendant company was guilty of negligence in the manner of running its car at the time the accident occurred. This is the only question in the case, and the only one raised by the specifications of error. The learned judge below was asked to direct a verdict for the defendant. We think this request was properly refused, as there was evidence which could not be withdrawn from the jury. It may be, as contended by the defendant, that the child ran suddenly under the car, and was not seen by the gripman; but there was evidence on the part of the plaintiff that other persons saw the child when the car was two lengths and a half away. There was also evidence that the gripman, at the time, was not attending to his business; that he was standing on the side of the cab with one hand out of the window, and looking towards the houses he was passing, and that he did not have hold of his grip or brake; that when halloed to by persons who saw the child, he paid no attention to the warning. This testimony, if true, and it has been so found by the jury, is of a very damaging character. The running of this class of cars through the crowded streets of the city is necessarily attended with danger. In fact it is difficult to have rapid transportation through a city without an element of danger. Very much depends upon the care of the gripman. He should always be on the alert to avoid danger, and his attention never should be diverted from his duties. He should keep his eye constantly on the track before him. If he is permitted to gaze at houses or other objects while the car is in motion, and an accident occurs by reason of such conduct, the company employing him must expect to be held responsible; and it is suggested for the benefit of such corporations, as well as for the safety of the public, that under no circumstances should anyone be allowed to ride in the cab with the gripman. Such a matter cannot fail

to distract his attention from his duties, and may be the cause of some serious accident.

Judgment affirmed.

STREET RAILWAYS — NEGLIGENCE IN RUNNING OVER CHILD. — QUESTION FOR JURY: See *Rosenkrans v. Lindel R'y Co.*, 108 Mo. 9; 32 Am. St. Rep. 588, and note with cases collected; also *Anderson v. Minneapolis etc. R'y Co.*, 42 Minn. 490; 18 Am. St. Rep. 525, and especially note; see also *Chilton v. Central Traction Co.*, 152 Pa. St. 425.

STREET RAILWAYS — DUTY OF PERSON IN CHARGE OF CAR. — It is not sufficient care on the part of a gripman on a cable car on approaching a curve to ring the bell, and, observing that the way is clear, go ahead, neither looking to the right nor the left: *Winters v. Kansas City Cable R'y Co.*, 99 Mo. 509; 17 Am. St. Rep. 591, and note. It is the duty of a street-car driver to sit or stand where he can have such control of his car and team as is practicable. He must be in a place and condition to exercise a reasonable degree of care and diligence in watching the street ahead of him, so as to prevent collisions and avoid injury to pedestrians: *Anderson v. Minneapolis etc. R'y Co.*, 42 Minn. 490; 18 Am. St. Rep. 525; note to *Rascher v. Detroit etc. R'y Co.*, 30 Am. St. Rep. 450; and see *Hays v. Greenville etc. R'y Co.*, 70 Tex. 602; 8 Am. St. Rep. 624; and *Philadelphia etc. R'y Co. v. Henrice*, 92 Pa. St. 431; 37 Am. Rep. 699, to the same effect.

GILMORE v. FEDERAL STREET ETC. R'y Co.

[153 PENNSYLVANIA STATE, 31.]

STREET RAILWAY CORPORATIONS HAVE NOT THE EXCLUSIVE RIGHT TO THE HIGHWAYS upon which they are permitted to run their cars, or even to the use of their own tracks. The public have the right to use these tracks in common with the railway corporations, and therefore it is not negligence *per se* for a citizen to be anywhere upon such tracks.

STREET RAILWAY CORPORATION OWES A DUTY to exercise such watchful care as will prevent accidents or injuries to persons who, without negligence, may not be able to get out of the way of a passing car.

STREET RAILWAYS. — IT IS NEGLIGENCE TO RUN A CAR ALONG A DARK AND UNLIGHTED ALLEY on a dark night at a rate of speed that will not permit its stoppage within the distance covered by its own headlight.

STREET RAILWAYS — CONTRIBUTORY NEGLIGENCE. — If the driver of a team stops it in a dark alley, and leaves it upon the track of a street railway unhitched and unattended, he is guilty of negligence, and there can be no recovery against the railway corporation for injuries suffered by the collision of its street car with such team, though the motor man of such car was also guilty of negligence in running it at a rapid rate of speed through such alley.

ACTION to recover damages sustained through the collision of plaintiff's horse and wagon with defendant's street car. Plaintiffs had their stable in Church Alley, in the city of Allegheny. Their driver drove up to the stable, and stopped in

the alley, and upon the tracks over which the defendant was operating an electric street railway, and left the team standing unattended while carrying several parcels into the stable. He saw the car approaching, and realizing the danger, tried to lead his horse out of the way, and called to the motor man to stop. The latter did not hear him nor see the team until too late to prevent the collision from which the plaintiff's horse was hurt. Verdict and judgment for the plaintiff.

W. P. Potter and William A. Stone, for the appellant.

Charles A. Sullivan, for the appellees.

HEYDRICK, J. There was abundant evidence to justify a jury in finding the defendant company guilty of negligence. Street railway companies have not an exclusive right to the highways upon which they are permitted to run their cars, or even to the use of their own tracks. The public have a right to use these tracks in common with the railway companies, and therefore, while the rights of the latter are in some respects superior to those of the former, as was said in *Ehrisman v. East Harrisburg City Pass. R'y Co.*, 150 Pa. St. 180, it is not negligence *per se* for a citizen to be anywhere upon such tracks. So long as the right of a common user of the tracks exists in the public, it is the duty of passenger railway companies to exercise such watchful care as will prevent accidents or injuries to persons who, without negligence upon their own part, may not at the moment be able to get out of the way of a passing car. The degree of care to be exercised must necessarily vary with the circumstances, and therefore no unbending rule can be laid down, but there is no difficulty in saying that it is negligence to run a car along a narrow and unlighted alley in a dark night at a rate of speed that will not permit its stoppage within the distance covered by its own headlight. This, according to the testimony of the defendant's own witness, its motor man, it did the night of the accident, by which the plaintiff's horse was injured.

But the plaintiff's driver, according to his own testimony, was equally negligent. He left his horse and wagon standing unguarded upon the track, and went into a stable in close proximity. How long he was absent does not appear, nor is it material. It was his duty to exercise the same watchful care when upon the track that the law exacts of the railway company in running its cars. It is an unbending rule, to be observed at all times and under all circumstances, that a per-

son about to cross the track of a street railway must look in both directions for an approaching car before attempting to cross: *Ehrisman v. East Harrisburg City Pass. R'y Co.*, 150 Pa. St. 180; *Wheelahan v. Philadelphia Traction Co.*, 150 Pa. St. 187; but compliance with this rule would be an idle ceremony if a person might afterwards stop his horse or vehicle upon the track, relax his vigilance, and, leaving his horse unguarded, go into a building in the vicinity, and there remain any length of time whatever. As well might a motor man desert his post of duty, and go into the car to speak to a passenger, or for any other purpose. For less negligence than that on the part of a gripman this court recently sustained a judgment against a street railway company, the injured party being free from contributory negligence: *Schnur v. Citizens' Traction Co.*, 153 Pa. St. 29, *ante*, p. 680. For these reasons the defendant's points ought to have been affirmed.

The judgment is reversed.

STREET RAILWAYS—DUTY OF PERSON IN CHARGE OF CAR.—It is the duty of the gripman of a street-railway car to keep his eyes on the track before him, and to keep hold of the grip or brake to avoid injury to persons or vehicles crossing the track: *Schnur v. Citizens' Traction Co.*, 153 Pa. St. 29; *ante*, p. 680, and note with cases collected. See also extended note to *Western Paving etc. Co. v. Citizens' etc. R. R. Co.*, 25 Am. St. Rep. 481.

STREET RAILWAYS—RIGHTS OF IN STREETS.—The right of a railway in a street is only an easement to use the highway in common with the public. It has no exclusive right of travel upon its track, and a person is not negligent nor a trespasser in driving upon its track: *Rascher v. Detroit etc. R'y Co.*, 90 Mich. 413; 30 Am. St. Rep. 447, and note; *Swain v. Fourteenth Street R'y Co.*, 93 Cal. 179; *Spurrier v. Front Street etc. R'y Co.*, 3 Wash. 659. A franchise granted to a street railway gives it no exclusive use of that portion of the street upon which its road is constructed, but only the right to construct such road in such place and manner as not to interfere with the use of the street by the public: *Pacific R'y Co. v. Wade*, 91 Cal. 449; 25 Am. St. Rep. 201, and note. The question of the rights, duties, and obligations of street-railway corporations with respect to the streets is discussed in the extended note to *Western Paving etc. Co. v. Citizens' etc. R. R. Co.*, 25 Am. St. Rep. 475.

BOYD v. THOMPSON.

[158 PENNSYLVANIA STATE, 78.]

PARTNERSHIP. — JUDGMENTS ENTERED UPON SEALED JUDGMENT NOTES GIVEN IN THE NAME OF A FIRM BY ONE MEMBER THEREOF, without authority from the other, will not be set aside at the instance of such other member, or of creditors of the firm, though such notes were given for partnership indebtedness not yet due. Because such notes were valid and existing neither the dissenting partner nor the other creditors have any equitable ground for relief.

MOTION to set aside a judgment based upon judgment notes executed in the firm name of Thompson and Coxe by James R. Thompson, a member of the firm. Each of the notes was given without the consent of the other copartner, but was for the indebtedness of the firm existing but not yet due. The motion was made by Coxe and certain execution creditors of the firm, but being denied, this appeal was taken.

John G. Johnson, John Sparhawk, Jr., and L. W. Barringer, for the appellants.

E. C. Shapley, Allen H. Gangwer, and J. B. Colahan, Jr., for the appellee.

WILLIAMS, J. These cases depend on the same questions. The difficulty thought to be encountered in them is much more apparent than real. There is a long line of cases, among which is *Schmertz v. Shreeve*, 62 Pa. St. 457, 1 Am. Rep. 439, holding that one partner cannot bind his partners or his firm by a deed or other instrument under seal, by virtue of his implied power as a member of the firm to represent it. There is another line of cases which hold that a judgment confessed by one partner for a partnership debt will authorize a levy and sale of goods belonging to the firm as well as the separate goods of him who confessed the judgment. Perhaps the most recent of these is *McCleery v. Thompson*, 130 Pa. St. 443. The apparent inconsistency between these lines of decisions will disappear when the cases themselves come to be examined and the real point in controversy ascertained. Thus *Schmertz v. Shreeve*, 62 Pa. St. 457, 1 Am. Rep. 439, was an action on an executory contract under seal for the future delivery of oil at the city of Pittsburgh. A seal was not necessary to the proper execution of such a contract, but if the partner had the power to bind the firm by its use he changed the nature of the undertaking; for the seal imported a consideration, and would prevent the

running of the statute of limitations applicable to the case of a simple contract. The question was therefore one of the power of a partner so to bind his firm. The opinion of this court was delivered by Justice Sharswood, who said in substance that as the contract was executory the question whether a seal was necessary to its valid execution was unimportant. The controlling question was whether one partner could bind the partnership by an executory contract under seal. "Executed contracts, such as assignments," said he, "stand on another ground. They form but the evidence of the act. The sale and delivery of merchandise, for example, is within the implied power of one partner. That he superadds a bill of sale or transfer under seal is but evidence of the act of disposition, and does not change its nature." The seal is unnecessary upon such an instrument, and its presence neither adds to nor modifies in any measure its legal effect.

Now the implied power of a partner to bind his firm rests on the doctrine of agency. The firm is an invisible artificial person, and necessarily represented by the natural persons who compose it. What they do therefore within the scope of the business in which the firm is engaged, and on its behalf or in its name, they do as its agents; and the agency grows out of and is implied from the relation between the invisible firm and the persons who have united to create it. A partner may buy and sell the goods in which the firm deals. He may borrow money for its use and give a note in the firm name therefor. He may indorse negotiable notes received by the firm in the course of its business with the firm name. He may give receipts, bills of sale, releases, and the like in the firm name, and whether he appends a seal thereto or not is wholly unimportant, as such papers evidence a past transaction and impose no new liability. He may settle an existing debt by sale of the firm goods, or payment out of its funds, or by a note in the firm name. He has a right to insist that the goods belonging to the partnership shall be used to pay the partnership debts, and if he deems it necessary to his own security or that of the creditor, he may confess a judgment against the firm for the amount of such debt which will justify the levy and sale of the goods of the firm and his own in payment thereof. In so doing he imposes no new or original liability on his firm, for the debt was already due from it. In that sense the judgment is not an executory contract to be performed in future, but a mode of payment for a debt con-

tracted in the past, the consideration for which the firm has already enjoyed. Such a judgment has been sustained for purposes of execution against the goods of the firm in many cases, among which are *Harper v. Fox*, 7 Watts & S. 142; *Grier v. Hood*, 25 Pa. St. 430; *Ross v. Howell*, 84 Pa. St. 129; *McCleery v. Thompson*, 130 Pa. St. 443.

But the implied power of one partner does not extend to the persons or separate estates of his copartners, and for that reason such a judgment will be vacated on their application so far as they individually are concerned, or their individual estates real or personal: *McNaughton's Appeal*, 101 Pa. St. 550. So much is necessary for their protection, but they have no equity as against the creditors of their firm which entitles them to be heard against the enforcement of such a judgment. On the contrary, the superior equity is in the creditors, whose right, in law as well as in morals, to have recourse to the firm property for the payment of their debts, is clear.

In the case before us the firm appears to consist of two members. One of these has confessed judgments in favor of certain firm creditors who have proceeded to seize the partnership property. The debts are not denied. There is no controversy over the amount of the judgments. No defense to a single dollar of them is suggested. But one partner asserts that the court should set aside these writs and vacate the judgments, because there was a seal appended to the warrant of attorney to confess judgment.

But in the language of Justice Sharswood, the confession of the judgment has imposed no new liability upon the firm. It was liable to the same creditors for the same sums before it was given. The seal was wholly unnecessary, but what is of more consequence, it has not changed the nature of the instrument. Whether sealed or not the warrant is lost in the judgment. The seal cannot change the remedy, affect the statute of limitations, or the order of proof. The addition of it to the confession of judgment was a waste of a very valueless formality, without object on the part of the maker, and without results to the creditor.

The court below was exactly within the rule in *Schmertz v. Schreeve*, 62 Pa. St. 457, 1 Am. Rep. 439, in holding that the dissenting partner had suffered no injury, and that neither he, nor the firm whose debt it was, had any equitable ground for relief, upon the petition or proofs before the learned judge who heard the motion.

For these reasons the appeal is dismissed and the order of the court below affirmed, so far as it relates to the firm of Thompson and Coxe. The judgment should be vacated as to Coxe as an individual, if he so desires.

PARTNERSHIP — POWERS OF INDIVIDUAL PARTNERS — CONFESSION OF JUDGMENT. — One partner cannot execute a warrant of attorney to confess judgment in the firm name, without either express authority or a ratification of the act: *Hier v. Kaufman*, 134 Ill. 215. A judgment confessed by one partner in the firm name though for a firm debt, is void against the others, but is good as against the partner confessing it: *McCleery v. Thompson*, 130 Pa. St. 443; *Bitzer v. Shunk*, 1 Watts & S. 340; 37 Am. Dec. 469, and note; *North v. Mudge*, 13 Iowa, 496; 81 Am. Dec. 441, and note; *Morgan v. Richardson*, 16 Mo. 409; 57 Am. Dec. 235; *Morgan v. Scott*, Minor, 81; 12 Am. Dec. 35, and note with cases collected.

PARTNERSHIP — POWER OF INDIVIDUAL PARTNER TO BIND FIRM BY EXECUTING SEALED INSTRUMENT. — One member of a firm is not bound by a sealed instrument executed by a copartner without his knowledge or authority, unless he subsequently ratifies it: *Hull v. Young*, 30 S. O. 121; *McDonald v. Eggleston*, 26 Vt. 154; 60 Am. Dec. 303, and note with the cases collected; but where the contract is independent of the instrument, and has been executed on behalf of the firm, the making for the purposes of evidence of an instrument under seal, by a partner, will not vitiate the contract: *Schmertz v. Shreeve*, 62 Pa. St. 457; 1 Am. Rep. 439; *Walsh v. Lennon*, 98 Ill. 27; 38 Am. Rep. 75. The seal may be rejected as surplusage and the instrument treated as the parol contract of the partnership: *Sterling v. Bock*, 40 Minn. 11. In *Dubois' Appeal*, 38 Pa. St. 231, 80 Am. Dec. 478, it was held that a mortgage given to three partners to secure the payment of a debt due the firm may be transferred by an assignment of such debt executed by one of the partners in the name of the firm. And the fact that a seal is appended to the name of the firm does not invalidate the assignment. If one partner executes a deed of release under his hand and seal in the firm name, of a debt due the firm, the release is binding on the firm: *Pierson v. Hooker*, 3 Johns. 68; 3 Am. Dec. 467.

NICE v. WALKER.

[153 PENNSYLVANIA STATE, 123.]

MECHANIC'S LIENS. — IF A CONTRACTOR COVENANTS WITH AN OWNER NOT TO FILE A LIEN NOR TO PERMIT ONE TO BE FILED by others, neither he nor any subcontractor under him is entitled to a lien. The subcontractor is charged with notice of all the terms of the contract and is bound thereby. He cannot have the benefit of the builder's contract without accepting its conditions.

MECHANIC'S LIENS. — TO PREVENT A CONTRACTOR OR SUBCONTRACTOR FROM FILING A LIEN against a builder, there must be an express covenant against liens, or a covenant resulting as the necessary implication from the language employed, and an intended covenant should so clearly appear that a mechanic or material man can understand it without con-

sulting a lawyer as to its legal effect. A covenant that the owner will not be answerable for any loss or damage that may happen or for any materials or other things used in furnishing and completing the work, does not interfere with the right of either the contractor or subcontractor to file and enforce a lien.

E. S. Dixon and B. E. Chain, for the appellant.

De Forrest Ballou and Henry M. Brownback, for the appellee.

PAXSON, C. J. This action was a *scire facias sur* mechanics' lien in the court below. The learned judge held that it was ruled by *Dersheimer v. Maloney*, 143 Pa. St. 532, as appears by the following extract from his charge to the jury: "It has been ruled by the supreme court in the case of *Dersheimer v. Maloney*, 143 Pa. St. 532, which was a precisely similar proceeding, in which these precise words occurred, that this was a covenant against filing any lien, or which would bar any claim either against the owner, or his property, and I am bound to rule this case in the light of that decision."

It is manifest there is some confusion in the professional mind as to the line of cases commencing with *Schroeder v. Galland*, 134 Pa. St. 277, 19 Am. St. Rep. 691, in regard to the right of a subcontractor to file a mechanic's lien, and if any portion of this confusion is justly chargeable to this court we cheerfully accept our share of the blame. It may be that some of the cases will have to be slightly modified. In any event, it seems necessary to review this line of cases to the extent at least of seeing just where we stand, and laying down a rule which will leave nothing in doubt as to the future.

In *Long v. Caffrey*, 93 Pa. St. 526, the contractor for the erection of the building stipulated in writing with the owner that he would not file a mechanic's lien against said building, and we held that he was bound by his contract. This case was followed by *Scheid v. Rapp*, 121 Pa. St. 593, in which the contractor covenanted, "for himself, his heirs, executors and administrators, that he will not suffer or permit to be filed . . . any mechanic's lien or liens against the said building for the period of six months after its completion." The lien in this case, as in *Long v. Caffrey*, 93 Pa. St. 526, was filed by the contractor himself, and we held, as in that case, that he was debarred by his own covenant from filing the lien.

In *Schroeder v. Galland*, 134 Pa. St. 277, 19 Am. St. Rep. 691, we went one step further, and held that where the contractor had covenanted with the owner not to file a lien, nor

to permit liens to be filed by others, the subcontractors were bound by the covenant of the contractor with the owner, and, as he could not file a lien, they could not. This was an inevitable and logical conclusion from the doctrine laid down in the prior cases. As was held in *Schroeder v. Galland*, 134 Pa. St. 277, 19 Am. St. Rep. 691, the only connection between the owner and the subcontractor being through and by means of the contract between the owner and the principal contractor, the subcontractor is chargeable with notice of all its terms and stipulations, and is bound thereby. He cannot have the benefits of the builder's contract without accepting its conditions. The only ground upon which the contractor can bind the building, for either materials or labor, is by virtue of the authority delegated to him by the owner, and where no such authority is delegated, but on the contrary, is expressly withheld, and he covenants that no liens shall be filed against the building, he cannot file a lien himself, nor can his subcontractors do so.

In a *per curiam* opinion, filed at the commencement of this term, and which has not yet been reported (the preceding case), it was said, in substance, that the principle intended to be decided in *Schroeder v. Galland*, 134 Pa. St. 277, 19 Am. St. Rep. 691, was that, the subcontractor cannot file a lien where the contractor has expressly covenanted not to do so, or where such covenant appears by necessary implication from the contract itself. It is believed that the words, "necessary implication," have not been understood as we intended them to be, and that most of the confusion arising in this class of cases grows out of this misunderstanding. It is possible we have not been sufficiently explicit upon this point. Hence, we have had case after case in which the contention has been, whether the peculiar language of the contract between the owner and the contractor amounts to a covenant not to lien a building. If I am right in this, it is quite time that the law upon this subject should be defined so clearly that it cannot readily be misunderstood. It should be so plain that every mechanic and material man, though of limited education, can understand it at a glance, and not be compelled to submit its interpretation to a lawyer, with the risk of a decision against him in the court of last resort.

To illustrate my meaning upon this subject I will now consider briefly the particular provisions of the contract in *Schroeder v. Galland*, 134 Pa. St. 277, 19 Am. St. Rep. 691, and the

cases which have followed it, so far as they have been reported.

In *Schroeder v. Galland*, 134 Pa. St. 277, 19 Am. St. Rep. 691, the contract between the owner and the principal contractor stipulated that the building should be built, finished, and delivered over to the owner "free of all liens and encumbrances, or any claims whatever that might arise under any action of the party of the second part or his legal representatives under this contract." It was further provided, as is usual in such contracts, that all wages of artisans and laborers, and all persons furnishing materials to the contractor on account of the contract, shall be paid by the contractor. These are the essential features of the contract, and we held in that case that the stipulation against liens was not only obligatory upon the principal contractor, but also upon the subcontractors, and that they could not recover.

In *Benedict v. Hood*, 134 Pa. St. 289, 19 Am. St. Rep. 698, the agreement between the contractor and owner contained an express covenant against liens, in the following words: "And it is further agreed that the party of the first part will not at any time suffer or permit any lien, attachment, or other encumbrance, under any law of this state, or otherwise, by any person or persons whatsoever, to be put or remain on the building or premises, into or upon which any work is done, or materials are furnished under this contract, for such work and materials, or by reason of any other claim or demand against the party of the first part; and that any such lien, attachment, or other encumbrance, until it is removed, shall preclude any or all claim and demand for any payment whatsoever, under or by virtue of this contract."

This is sufficiently explicit, and does not need comment. It will be noticed that the covenant is much stronger than in *Schroeder v. Galland*, 134 Pa. St. 277, 19 Am. St. Rep. 691, the difference being that in the one case there is an express covenant not to file liens, while in the other the covenant is only to be implied from language about which laymen might differ, and possibly lawyers.

In *Murphy v. Morton*, 139 Pa. St. 345, it was held that a covenant by the contractor for the erection of a building that before the final payment shall become due he will furnish releases from all persons having a right of lien, will not protect the owner from mechanics' liens for work done or materials furnished in good faith by subcontractors and material men,

and was not a covenant on the part of the contractor not to file a lien. On the contrary, there is a recognition of the right of subcontractors and material men to lien the building. The provision of the contract that before the contractor shall receive his last payment he shall furnish releases from all persons entitled to file liens is a recognition of the right to file them.

In *Willey v. Topping*, 146 Pa. St. 427, the original contract for the erection of the building contained no prohibition of mechanics' liens, and we held that a subsequent release of his right did not prevent the filing of a lien by a material man, though the materials were furnished after the release was delivered; that while a subcontractor is bound by the terms of the original contract between the owner and the contractor, he is not bound to inquire from time to time whether such contract has been changed or modified. To the same point is *Cook v. Murphy*, 150 Pa. St. 41.

In *Moore v. Carter*, 146 Pa. St. 492, it was held that a stipulation that the contractor shall furnish releases from subcontractors, etc., before the last installment of the contract price shall be paid, will not preclude the filing of a mechanic's lien by the contractor in advance of the furnishing or procuring of such releases.

In *Loyd v. Krause*, 147 Pa. St. 402, the clause in the contract which was relied upon to defeat the claim was as follows: "Neither shall there be any legal or lawful claims against the party of the first part in any manner, from any source whatever, for work or materials furnished on said work." It was held that these words did not contain a stipulation that there shall be no mechanics' liens filed against the building, nor that the building shall be delivered to the owners free from any liens or encumbrances. It will be noticed, however, that this provision is at least as strong as the one in *Schroeder v. Galland*, 134 Pa. St. 277, 19 Am. St. Rep. 691, which was held sufficient to prevent the subcontractor from filing a lien. In that case the contract was that the building should be delivered to the owner "free of all liens and encumbrances that might arise under any action of the party of the second part or his legal representatives under this contract."

In *Bolton v. Hey*, 148 Pa. St. 156, the building agreement, after stipulating for the time and modes of payment, provided as follows: "It is further agreed that the said building

shall be built, finished, and delivered over to the party of the first part free of all liens and encumbrances, or any claims whatever that might arise under any action of the party of the second part, or his legal representatives under this contract, and that the provisions of the ninth section of this contract shall not be taken to subject the said building to any liability for the payment for labor or materials furnished in or about the erection thereof, or the said party of the first part to any liability therefor other than the payment of the contract price to the said party of the second part as therein provided."

It was held that the above words constituted an implied covenant against filing liens, and that a subcontractor could not recover against the owner for materials furnished. It will be noticed that there is something more here than an agreement to deliver the building to the owner free of all liens and encumbrances. There is a further stipulation that the provisions of the ninth section of the contract shall not be taken to subject the building to any liability for the payment of labor or materials furnished in or about the erection thereof. While a lawyer may be able to find in the language quoted an implied covenant against filing liens, the mechanic or material man might be misled thereby. The covenant to deliver the building free of encumbrances is not a covenant against filing liens, as we have said in a number of cases, while the subsequent provision that nothing in the contract shall subject the building to liens for labor or materials is not free from criticism. It is not the contract that subjects the building to liens, but it is the law which renders it so liable, and the contract should have expressly prohibited the filing of any liens. This case stands upon the very border, and goes further in sustaining an implied covenant against filing liens than we are now prepared to go.

In *McElroy v. Braden*, 152 Pa. St. 78, there was an express agreement that no liens were to be filed, either by the contractor or subcontractor, and the principal contention was, whether it is necessary that such an agreement should be in writing. The court below held that it was not essential that the stipulation referred to should be in writing, but it must be definite and explicit. This ruling was affirmed by this court. We could not say as a matter of law that the agreement between the owner and contractor must be in writing, although few prudent business men would be willing to trust

to the uncertain testimony of witnesses for the details of such an important transaction.

The learned judge below held, as has been already stated, that the case in hand was ruled by *Dersheimer v. Maloney*, 143 Pa. St. 532. It remains to consider that case with *Tebay v. Kirkpatrick*, 146 Pa. St. 120, which was ruled upon the former case.

The contract in the case in hand, so far as this question is concerned, is substantially the same as in *Dersheimer v. Maloney*, 143 Pa. St. 532, and was evidently prepared in accordance therewith. The controlling portions of the contract in that case, as we find from the report of it, are as follows: "Eighty-five per cent will be paid as the work progresses on labor and materials, in monthly payments, according to and upon the estimate of the architect. The proprietor reserves the right to pay bills, deducting fifteen per cent until completion: Provided, that in each case of payment a certificate shall be obtained from the architect; . . . and, provided further, that in each case a certificate shall be obtained by the contractor from the clerk of the office where liens are recorded, signed and sealed by the clerk, that he has carefully examined the records and finds no liens or claims recorded against said work, neither shall there be any legal or lawful claims against the contractor in any manner, from any source whatever, for work or materials furnished on said works."

"7. The proprietor will not, in any manner be answerable or accountable for loss or damage that shall or may happen to said work or any part or parts thereof respectively, or for any of the materials or other things used and employed in finishing and completing said works; or for injury to any person or persons, either workmen or the public, or for damage to adjoining property."

This was held to be an implied covenant against the filing of liens. That it was a close case may be inferred from the language of this court, where it was said: "While the language of the contract in that case (*Schroeder v. Galland*, 134 Pa. St. 277, 19 Am. St. Rep. 691) differs from that employed in the agreement before us, we have no doubt the parties intended to provide against the filing of liens; and while they have not done so in express terms, we think that by fair intendment the words used necessarily include both liens and personal liabilities. The owner is not to "be answerable or accountable . . . in any manner" for any liabilities, etc.

If this is not an implied covenant against filing liens, then the owner is "answerable or accountable" in at least one mode or manner; not liable in person, it is true, but in property, which is equally efficacious. Again, in the second clause, the inhibition is: "Neither shall there be any legal or lawful claim against the contractor in any manner, from any source whatever for work or materials."

While it may be true that the parties to this contract intended to provide against the filing of liens by subcontractors, the stronger light which has been thrown upon this question leads us to the conclusion that it is not as explicit as it might and ought to have been. Nor do we attach much importance to the words that there shall not be any legal or lawful claim against the contractor. It was not in the power of the owner or contractor, or of both of them, to prevent claims being brought against the contractor. It is the owner, or rather his building, which is intended to be protected by this and similar covenants.

The other ground, upon which this decision was based, is, that the owner is not to "be answerable or accountable . . . in any manner" for any of the materials, etc., is not free from criticism. An examination of that clause of the contract shows that it is at least capable of another interpretation, and that the owner was stipulating, not that he would not be accountable for materials furnished to the building, but, that he would not be responsible "for loss or damage that shall or may happen to said work, or any part or parts thereof respectively, or for any of the materials or other things used and employed in finishing or completing said work; or for injury to any person or persons, either workmen or the public, or for damage to adjoining property."

We think this language may fairly be interpreted to be a covenant that the owner shall not be responsible for any loss occasioned by the injury or destruction of the building, or the materials composing it, during the erection and construction. And the further covenant, that the owner will not be responsible to any person or persons, either workmen or the public, or for damage to adjoining property strengthens this view.

The essential portions of the contract in the case in hand are as follows: "6. The owner will not in any manner be answerable or accountable for any loss or damage that shall or may happen to the said works, or any part or parts thereof,

respectively, or for any of the materials or other things used and employed in finishing and completing the said works.

"7. The said parties of the second part agree to take, use, provide and make all proper, necessary and sufficient precautions, safeguards and protections against the occurrence or happening of any accidents, injuries, damages or hurt to any person or property during the progress of the entire work, and for all such accidents, injuries, damages or hurt the said parties of the second part alone to be responsible, and not the said party of the first part, or the architect; it being agreed that the work to be done shall be entirely under the control of the parties of the second part, except so far as provision is herein made for the instruction thereof of the architect."

The two paragraphs above quoted must be read together. Thus considered, it is a covenant that the owner will not be responsible for any "loss or damage" that shall or may happen to the said building or to the material or other things used and employed in erecting it, and that the contractor shall be responsible for all accidents, injuries, damages or hurt to any person or property during the progress of the entire work.

That the contract in question is fairly subject to this construction is a sufficient reason why it should not be held to bar the right of the subcontractor to file a lien. An examination of this class of cases creates a feeling of surprise that if parties intended to covenant against the filing of liens, they should employ such ambiguous language, when three lines, clearly expressed, would remove all doubt upon this subject. It is sufficient to say that no lien shall be filed against the building by either the contractor or subcontractor.

Tebay v. Kirkpatrick, 146 Pa. St. 120, was decided upon *Dersheimer v. Maloney*, 148 Pa. St. 532, and the contracts in the two cases are substantially similar. The criticisms of the latter case apply equally to the former.

We are of opinion that in order to prevent the contractor or subcontractor from filing a lien against the building, there must be an express covenant against liens, or a covenant resulting as a necessary implication from the language employed; and that the implied covenant should so clearly appear, that the mechanic or material man can understand it without consulting a lawyer as to its legal effect.

In the case in hand there is no such express covenant, nor is such covenant to be reasonably implied from the terms of

the contract. It was, therefore, error to instruct the jury to render a verdict for the defendant.

The judgment is reversed, and a *venire facias de novo* awarded.

MECHANIC'S LIENS — SUBCONTRACTOR, HOW AFFECTED BY CONTRACT OF CONTRACTOR. — When a contractor for the construction of a building has stipulated with the owner that no mechanic's lien shall be filed on the building, such a stipulation is binding upon the subcontractors working for him: *Taylor v. Murphy*, 148 Pa. St. 337; 33 Am. St. Rep. 825, and note with cases collected.

ELLINGER v. PHILADELPHIA ETC. R. R.

[153 PENNSYLVANIA STATE, 212.]

A RAILWAY CORPORATION IS NOT ANSWERABLE FOR THE INJURIES TO A PASSENGER RESULTING FROM HER BEING JOSTLED AND PUSHED BY AN IMPATIENT MAN, not an employee of the corporation, trying to enter the car from which she was alighting, thereby causing her to fall.

David W. Sellers, for the appellant.

Dimmer Beeber, for the appellee.

WILLIAMS, J. The injury from which the plaintiff suffered, and for which she seeks to recover in this action, was a fracture of the fibula a short distance above the ankle joint. She was a passenger over the defendant's railroad from Baltimore to Wilmington, and was alighting from the train at the railroad station in the latter city when the accident occurred. She explained the circumstances to the jury at the trial as follows: "I started to come down the steps, I hesitated to come down because there was no one to help passengers off. When I got on the last step a gentleman stepped up; I was too far down to turn around and go back up to leave him through. As I went to step down he stepped up and jostled me off." She repeated the same account on cross-examination. She was asked: "You was on the lowest step stepping down as he came between the body of the car and yourself and jostled you?" She replied, "Yes." This is the whole case. Upon this state of facts the question of negligence was submitted to the jury and promptly found in favor of the plaintiff. The question before us is whether there were such proofs of negligence as to justify the submission of the question, or sustain this verdict? It is important to remember that there was here no failure of any of the appliances of transportation.

to bring the case within the rule laid down in *Laing v. Colder*, 8 Pa. St. 482, 49 Am. Dec. 533. The plaintiff had been carried safely to her destination. The train was at rest. Unlike the case of *Pennsylvania R. R. Co. v. Peters*, 116 Pa. St. 206, ample time was afforded her to leave the train. No complaint is made about the character of the steps, and the evidence shows that the usual guard rail by which passengers may steady their descent was in its proper place. The platform was neither defective in construction or condition. Many passengers from the same car preceded her in passing down the steps, while others followed closely behind her. She had reached the lowest step and was in the act of stepping from it to the platform when an impatient man desiring to take the train at that station stepped up on the step she was leaving and in so doing crowded or jostled her, and she fell. The immediate cause of her fall was the act of the impatient man in his effort to get upon the car. If the railroad company was bound to anticipate and provide against his haste and want of civility in his effort to reach a seat in the car, then the verdict is right. If not, then there was no cause for a jury and a compulsory nonsuit should have been entered. Protection against violence from drunken and disorderly persons upon its trains is the duty of the carrier: *Pittsburg etc. R. R. Co. v. Pillow*, 76 Pa. St. 510, 18 Am. Rep. 424. This duty doubtless extends to passengers waiting for trains in the rooms provided for them at railroad stations; but protection against bad manners is not, so far as I am aware, one of the duties owing by a carrier to its passengers. Rudeness is a breach of no positive law. The ordinary cars are, and must be, open to the masses, among whom there will be different degrees of intelligence and politeness; differences in physical vigor and temperament. There is, therefore, necessarily, a certain amount of rudeness, of haste, of selfish disregard of the nerves and of the comfort of others, to be met with wherever men and women congregate, whether upon railroad trains, in places of amusement or upon the streets of a city. Unless such conduct amounts to a breach of the peace the officers of the law can take no cognizance of it, and carriers are not bound to prevent it or liable in damages for its appearance about their stations or trains. The plaintiff was the victim of an act of rudeness. Just as she was letting herself down from the lowest step to the platform an impatient man thought he saw an opportunity to reach the interior

of the car, and stepped up beside her just at the instant when a "jostling" would disturb her poise and lead to her fall. Without intending harm, he inflicted it. It is not easy to see how the defendant could have prevented the accident by any system less comprehensive than one which should require it to escort every incoming passenger from the interior of the car to a place of safety outside its grounds; and every outgoing passenger from its waiting rooms to a seat inside the train. Neither the common law nor the statutes of this state have imposed such a duty on the carrier, and a jury should not be allowed to do it.

The judgment in this case is reversed.

RAILROADS — LIABILITY FOR INJURIES INFLICTED ON ONE PASSENGER BY ANOTHER. — Where a passenger is injured through a quarrel between two drunken men who are also passengers and the conductor seeing the fight failed to stop it, the company will be liable: *Pittsburg etc. R. R. Co. v. Pillow*, 76 Pa. St. 510, 18 Am. Rep. 424, and note with cases collected fully treating this subject: See *Chicago etc. R. R. Co. v. Pillsbury*, 123 Ill. 9, 5 Am. St. Rep. 483, and note, a case in which a railroad company was held liable for injuries sustained during a fight between a mob and some passengers upon the train; also extended note to *Ingalls v. Bills*, 43 Am. Dec. 263.

GAW v. BENNETT.

[153 PENNSYLVANIA STATE, 247.]

GAMBLING TRANSACTIONS IN STOCKS, EVIDENCE TO PROVE. — In determining what the intentions of the parties were, when it is claimed that their transactions consist of gambling in stocks, the jury has the right to consider the nature and character of the accounts between them, the acts of the parties, and all the circumstances surrounding their transaction so far as disclosed by the testimony, and may go behind the mere form given to the transaction and ascertain from all the evidence the real purpose of the parties and the actual character of their dealings with each other.

▲ **WAGERING CONTRACT** is one in which the parties, in effect, stipulate that they shall gain or lose upon the happening of an uncertain event in which they have no interest except that arising from the possibility of such gain or loss, and whether the contract is a wagering one or not is a question for the jury, unless the entire contract, unexplained by oral testimony, is in writing.

NOTES GIVEN TO A BROKER TO COVER LOSSES INCURRED IN STOCK-GAMBLING transactions are void.

ACTION on a promissory note to which the defense was that it was given to settle a balance due as the result of a series of stock-gambling transactions. The court at the trial refused

to direct a verdict for the plaintiffs, and at the request of the defendant gave fourteen instructions which it is not necessary to repeat because their substance is summed up in the fifteenth instruction given by the court, of its own motion, and which is as follows: "I have read these points to you, gentlemen. Some of them are very long, and I do not think you will recollect much of them. It all narrows down to the simple question of the intention of the plaintiffs. If the intention of the plaintiffs was to purchase and sell the stock, and their intention was not merely to hold Bennett responsible for the profits and losses, then your verdict must be for the plaintiffs. If, however, the intention was otherwise, that their intention was simply to settle with him on the profits and losses, then your verdict must be for the defendant." Verdict and judgment for the defendant.

John G. Johnson and C. Berkeley Taylor, for the appellant.

Furman Sheppard and Avery D. Harrington, for the appellee.

STERRETT, J. This suit is on a note made by defendant's intestate to the order of the plaintiffs for five thousand three hundred seventy-three dollars and eighty-nine cents, at six months from August 29, 1881. It appears to have been given for balance of accounts between the maker and the payees, covering a period of nearly three and a half years.

The note given in evidence by plaintiffs made a *prima facie* case, entitling them to a verdict, unless the testimony introduced by defendant was sufficient to justify the court in submitting to the jury, as was done, questions of fact suggested in his points, for charge, recited in the second to fourteenth specifications of error inclusive. As legal propositions, those points, as well as that part of the learned judge's charge recited in the fifteenth and last specification, appear to be correct. The sole question is, whether the evidence was sufficient to warrant the jury in finding the facts of which said points are predicated. This was frankly conceded by the learned counsel for plaintiffs. Having admitted in his printed argument that "the learned judge stated with thorough understanding the law applicable to the case," he virtually abandoned all his specifications of error except the first, which alleges the court erred in refusing to charge as requested by plaintiffs in their sixth point, viz.: "Under all the facts in the case, the verdict must be for the plaintiffs, if the note in

suit was executed by defendant's intestate." He thus rested his case solely on the proposition that the evidence was insufficient to warrant a verdict in favor of defendant.

We quite agree that this is the only debatable question in the case. As to the principles of law enunciated by the learned judge in his charge, and in his affirmance of points presented by both parties, the instructions were, if anything, more favorable to the plaintiffs than they should have been. In view of the testimony on which the defendant relied, plaintiffs presented eight points for charge, all of which, except the one above quoted, were affirmed without qualification. The jury were thus instructed, *inter alia*, as follows:—

1. If plaintiffs bought and sold stock for defendant's intestate, paying for and receiving the same in each instance, and settling and receiving the money therefor in good faith, then they must find for the plaintiffs, even if they believe said deceased had no intention of ever taking the stocks so purchased or delivering those sold; the fact that he intended to gamble cannot prejudice their case, unless they intended to gamble also.

2. The putting up of margins, retaining possession of stocks, and settling of differences are not enough to stamp the transactions as wagers; there must be facts to show that the actual intent of the parties was to wager merely on the prospective price.

3. If the jury do not find from the evidence an intention to wager by both the plaintiffs and the defendant's intestate, their verdict must be for the plaintiffs.

4. The burden of proof is upon the defendant; it is for him to show, by the weight of evidence, that plaintiffs and decedent were gambling.

These points, as well as those of the defendants above referred to, sufficiently indicate the nature of the defense to the note in suit. For the purpose of showing that the transactions referred to in said points were in fact wagering contracts, on the rise and fall of stocks, known as stock gambling, the defendant gave in evidence accounts rendered his intestate from time to time by the plaintiffs, and also their books containing accounts of their stock transactions with defendant's intestate during several years, and finally culminating in the balance for which the note in suit was given. He also called plaintiffs' bookkeeper, and examined him at considerable length in relation to said accounts rendered and book entries, and also

introduced witnesses to prove the financial standing of his intestate, the business in which he was engaged, etc.

It is not our intention, nor do we deem it necessary here to review the testimony. The result of the consideration we have given it will be quite sufficient. An examination of the accounts given in evidence, in connection with the oral testimony relating thereto, etc., has failed to convince us that there was any error in submitting the case to the jury for their consideration and determination. Without usurping their appropriate function of considering and weighing testimony and drawing therefrom such reasonable inferences of fact as may be warranted, the court could not have ruled, as matter of law, that the alleged purchases and sales of stocks by plaintiffs for account of defendant's intestate, were *bona fide* business transactions, in which there was an actual receipt or delivery of, and payment for the stocks alleged to have been so purchased or sold, or even any intention of either party that said stocks should be delivered, or received and paid for, as the case might be. On the contrary, we think the testimony tended to prove that the intention of both parties was merely to wager upon the prospective price of said stocks, settle the difference, and pay the gain or loss; in other words, their transactions, throughout, were in fact repeated acts of gambling in the stocks referred to in said accounts, and the jury were warranted by the evidence in so finding. In determining what the intention of the parties was in that regard, the jury had a right to consider the nature and character of the accounts, the acts of the parties, and all the circumstances surrounding their transactions, so far as the same are disclosed by the testimony. They had a right even to go behind the mere form given to their transactions, and ascertain from all the evidence the real purpose of the parties, and the actual character of their dealings with each other.

In this state the law relating to gambling contracts has been firmly settled in a long line of cases, among which are the following: *Brua's Appeal*, 55 Pa. St. 294; *Smith v. Bouver*, 70 Pa. St. 325, 328; *Kirkpatrick v. Bonsall*, 72 Pa. St. 155; *Fareira v. Gabell*, 89 Pa. St. 89; *North v. Phillips*, 89 Pa. St. 255; *Dickson's Ex'rs v. Thomas*, 97 Pa. St. 278; *Waugh v. Beck*, 114 Pa. St. 422; 60 Am. Rep. 354; *Harper v. Young*, 112 Pa. St. 419; *Griffiths v. Sears*, 112 Pa. St. 523.

In *Fareira v. Gabell*, 89 Pa. St. 89, the judgment of common pleas No. 2, Philadelphia, was affirmed on the principles

clearly enunciated in the charge of the learned president of that court. It was there held, among other things, that a wagering contract is one in which the parties in effect stipulated that they shall gain or lose upon the happening of an uncertain event in which they have no interest, except that arising from the possibility of such gain or loss; and whether the contract is a wagering one or not is a question for the jury, unless the entire contract, unexplained by oral testimony, is in writing. Also, that notes given to a broker to cover losses incurred in stock-gambling operations are void; that money advanced by a broker to pay such losses cannot be recovered, nor can the broker's commissions be recovered, because the whole transaction is unlawful.

The testimony in this case was clearly sufficient to warrant its submission to the jury. There was no error in refusing to charge as requested in plaintiffs' sixth point; nor do we find anything in the record that requires a reversal of the judgment.

Judgment affirmed.

MITCHELL, J., dissented.

WAGERS — DEFINITION. — A wager is a contract in which the parties stipulate that they shall gain or lose on the happening of a certain event, in which they have no interest except that arising from the possibility of such gain or loss: *Kitchen v. Loudenback*, 48 Ohio St. 177; 29 Am. St. Rep. 540, and note.

NEGOTIABLE INSTRUMENTS — GAMBLING CONTRACTS — INVALIDITY. — A promissory note given for losses in a speculation in "futures" is void: *Cunningham v. National Bank*, 71 Ga. 400; 51 Am. Rep. 266, and note; *Seeligson v. Lewis*, 65 Tex. 215; 57 Am. Rep. 593; *Snoddy v. Bank*, 88 Tenn. 573; 17 Am. St. Rep. 918; *McNamara v. Gargett*, 68 Mich. 454; 13 Am. St. Rep. 355, and note; note to *Sondheim v. Gilbert*, 10 Am. St. Rep. 34. A wagering contract for future sales is not within the provisions of the Missouri criminal statutes making gambling notes void in the hands of the holder; therefore a note based on such a contract is not void in the hands of an indorsee before maturity, simply because based upon such consideration: *Crawford v. Spencer*, 92 Mo. 498; 1 Am. St. Rep. 745. A note given for "margins" on dealings in "options" is not within the statute making void all notes given in "betting" or "gaming": *Shaw v. Clark*, 49 Mich. 384; 43 Am. Rep. 474. *Hanks v. Brown*, 79 Iowa, 560, was a case in which the defendant gave a note for a quantity of Bohemian oats, and for an interest in an agreement, whereby a certain amount of the oats raised from those purchased were to be sold for him at a certain price per bushel. There was a clause in the agreement to the effect that it was a speculation, and not based on the real value of the oats; it was held not to be a gambling transaction, and that a recovery could be had upon the note.

WAGERING CONTRACTS — INTENTION. — The question of the intent of the parties and the evidence to prove it is discussed in the monographic note to *Crawford v. Spencer*, 1 Am. St. Rep. 760.

BARD v. PENN MUTUAL FIRE INSURANCE COMPANY.

[153 PENNSYLVANIA STATE, 257.]

INSURANCE, NOTICE OF ADDITIONAL. — If a policy of insurance contains a condition that it shall be void in the event of procuring additional insurance, unless written notice thereof be furnished the secretary, and the approval of the company indorsed upon the policy, the effect of such condition cannot be avoided by proving that after the additional insurance was obtained, a director of the insuring corporation, having knowledge of the additional insurance, annually renewed the policy by accepting premiums thereon, there being no evidence that he was a general agent, or authorized to accept notice of overinsurance, or to waive its consequences.

CORPORATIONS. — NOTICE TO A DIRECTOR is not notice to a corporation, nor is he one of its executive officers to whom the details of its business are committed.

William T. Barber and R. T. Cornwell, and Gibbons Gray Cornwell, for the appellant.

Alfred P. Reid and Thomas W. Pierce, for the appellee.

PAXSON, C. J. The defendant is a mutual insurance company. The plaintiff insured his property with the company in the sum of two thousand five hundred dollars. Subsequently he effected insurance upon the same property in several other companies. It was conceded that his policy taken out in the defendant company contained the following condition of insurance: "If, when already insured in this company, he shall procure insurance on the same property in another, the policy issued by this company shall be void, unless written notice thereof be furnished to the secretary, and the approval of this company of such an additional insurance be indorsed upon the policy." This condition is an entirely reasonable regulation, and one that is not properly the subject of criticism. When the company issues a policy it has the right to know if any additional insurance in other companies is placed upon the same property. Were it otherwise it would be in the power of the assured to largely overinsure his property. This, as all experience shows, might sometimes lead to fraud. The company had the right to stipulate that it should be informed in writing of such additional insurance. The object of this stipulation is to avoid just such a dispute as has occurred in this case. Where a notice in writing is given to the company, there is no room for dispute, and it is likely to be acted upon. Whereas, a verbal notice, even if given to an officer of the company authorized to receive it, may be overlooked or for-

gotten in the hurry of business, thus leading to disputes and often to litigation. It is not contended that any notice in writing of the additional insurance had been given in this case. It was alleged, however, that John Gilfillan was a director of the company residing at Coatesville; that he had knowledge of the additional insurance of one thousand dollars effected in the Phoenixville Fire Insurance Company, and with such knowledge as agent of the company, annually thereafter renewed the policy in suit by accepting the premiums from the plaintiff. There was no evidence, however, that Mr. Gilfillan was a general agent of the company, and authorized to accept notice of overinsurance, or waive its consequence. It was held in *Mitchell v. Lycoming Mut. Ins. Co.*, 51 Pa. St. 402, that an agent of an insurance company whose duty it is to take surveys, receive application for insurance, examine the circumstances of a loss, approve assignments, and receive assessments, is not authorized to accept notice of overinsurance or waive its consequences. It was said by Mr. Justice Agnew in that case: "But the act of overinsurance is a forbidden act, and not the subject of authorized waiver by any officer or agent under the rules and regulations prescribed. It is on the principle of estoppel and not of authority the waiver takes effect. The knowledge of a mere agent, unauthorized to represent the company beyond the specific powers committed to him, cannot be the ground of estoppel in a matter unconnected with his powers. This can take place only when the knowledge lying at the foundation of the estoppel comes home to those officers who exercise the corporate powers of the company, or to an agent whose powers relate to the very subject out of which the estoppel arises."

It is equally clear that notice to a director is not notice to the company: *Inland Ins. etc. Co. v. Stauffer*, 33 Pa. St. 397. A director of a company is not one of its executive officers to whom the details of its business are committed. Directors are usually but consulting managers. They are but occasionally at the place of business of the company, and it would produce endless confusion if we were to hold that a verbal notice communicated to a director, not at the place of business of the company, but at his house, or upon the street, or wherever he might happen to be at the time, is binding upon the company.

The plaintiff having entirely failed to comply with the before-mentioned condition of his policy, we think the learned

judge below was justified in instructing the jury to find a verdict for the defendant.

Judgment affirmed.

CORPORATIONS — EFFECT OF NOTICE TO DIRECTORS. — Notice to the director of a corporation will not bind the corporation if it came to him unofficially, and is not communicated to his associate directors: *General Ins. Co. v. United States Ins. Co.*, 10 Md. 517; 69 Am. Dec. 174; *Buttrick v. Nashua etc. R. R.*, 62 N. H. 413; 13 Am. St. Rep. 578, and note. Notice to a corporation is not inferable from the knowledge of one of its directors when his interest is opposed to that of the corporation: *Commercial Bank v. Cunningham*, 24 Pick. 270; 35 Am. Dec. 322, and note; *Insolvency v. Merchants' Nat. Bank*, 139 Mass. 332; 52 Am. Dec. 710.

GRACE METHODIST EPISCOPAL CHURCH v. DOBBINS.

[153 PENNSYLVANIA STATE, 294.]

EASEMENTS AND SERVITUDES — IMPLIED GRANT. — Where the owner of land subjects part of it to an open, visible, permanent and continuous service or easement in favor of another part, and then alienates either, the purchaser takes subject to the burden or benefit, as the case may be.

EASEMENT — PROJECTING CORNICE. — IF A VENDOR GRANTS LANDS ON WHICH IS A HOUSE, its cornice and eaves projecting over land retained by him, the grant carries by implication the right to retain the cornice and eaves in the position they were in at the time of the grant.

Elias P. Smithers, for the appellant.

J. Martin Rommel and James M. West, for the appellee.

MITCHELL, J. The house was built in 1869 and this bill was not filed until 1891. For more than twenty-one years the projection of the cornice over the complainant's land was apparent and continuous. There was lacking, therefore, no element of a conclusive presumption in appellant's favor, and his title by lapse of time was complete.

But independent of the presumption from continuous adverse user, the appellant's title was good against the complainant. The latter never had any title except subject to the former's easement. The house was built in 1869 by Dobbins who was then the owner of both lots. In 1871 he sold the house and the land on which it stood to Morris, the cornice in question projecting over the land which the grantor retained. By subsequent conveyances the title to the land so retained came to the present appellee. Unless, therefore, Dobbins the grantor could have maintained this bill against

his grantee Morris immediately after his conveyance in 1871, the present complainant who holds only Dobbins's title subsequent to the conveyance, cannot maintain it now against the holder of Morris's title. It is of no consequence that the house with its cornice has come back to Dobbins. Before it did so he had parted with the other lot and it had come to complainants, so that there never was since 1871 a concurrent possession by Dobbins of both lots, from which a merger or a new starting point for the creation of the easement can be raised. He is in now not by his own prior title but by the title which accrued to Morris in 1871, and that includes the easement as to the cornice.

The law on this subject is settled beyond question. Where an owner of land subjects part of it to an open, visible, permanent and continuous service or easement in favor of another part, and then aliens either, the purchaser takes subject to the burden or the benefit as the case may be. This is the general rule founded on the principle that a man shall not derogate from his own grant. The rule is stated in Gale on Easements half a century ago, quoted with approbation by Chief Justice Gibson in *Seibert v. Levan*, 8 Pa. St. 383; 49 Am. Dec. 525; by Chief Justice Lewis, in *Kieffer v. Imhoff*, 26 Pa. St. 438; and expressly made the basis of decision in *Phillips v. Phillips*, 48 Pa. St. 178; 86 Am. Dec. 577. The cases in which the subject has most frequently come before this court, are those in which the grantor has conveyed the servient tenement, and the question has been whether the purchaser took subject to the easement remaining in the estate of the grantor, *Overdeer v. Updegraff*, 69 Pa. St. 110, and the rule has been uniformly held to be as above stated. Its enforcement would be *a fortiori* where the vendee purchases the dominant land, as in the present case. That is conceded even in the modern English cases which question the universality of the rule: See *Suffield v. Brown*, 4 De Gex, J. & S. 185, and the comments on it in Goddard's Law of Easements, Bennett's ed. 118. How far the question of necessity enters into the creation of such an easement we need not discuss. The cornice was a substantial and permanent part of the house as it existed when conveyed, and the right to maintain it cannot be controverted by the grantor or those succeeding to his title.

Decree reversed and bill dismissed with costs.

EASEMENTS, IMPLIED GRANT OF, BY SEVERANCE AND SALE OF PROPERTY: See notes to *Elliott v. Rhett*, 57 Am. Dec. 759-768; *Green v. Collins*, 40 Am. Rep. 537; *Kutz v. McCune*, 99 Am. Dec. 89; *Larson v. Metropolitan Street R'y Co.*, 33 Am. St. Rep. 456-458. That one who purchases real estate on which the owner has imposed an apparent servitude for the benefit of another part of his property takes subject to the easement, see *Zell v. Universalist*, 119 Pa. St. 390; 4 Am. St. Rep. 654, and note; *Elliott v. Rhett*, 5 Rich. 405; 57 Am. Dec. 750; *Sanderlin v. Baxter*, 76 Va. 299; 44 Am. Rep. 165; *Ellis v. Bassett*, 128 Ind. 118; 25 Am. St. Rep. 421; *Geible v. Smith*, 146 Pa. St. 276; 28 Am. St. Rep. 796. The essential question is whether the grantee in such cases has notice of the existence of the easement: *Newbold v. Peabody Heights Co.*, 70 Md. 494. Such notice may be inferred from the fact that the servitude is open and visible: *Carbrey v. Willis*, 7 Allen, 364; 83 Am. Dec. 688; *Butterworth v. Cranford*, 46 N. Y. 349; 7 Am. Rep. 352; *Shields v. Titus*, 46 Ohio St. 528; or from the terms of the deed under which the grantee takes the land: *Halle v. Newbold*, 69 Md. 265. The same principle applies where the premises subject to an easement are acquired by devise: *Huvell v. Estes*, 71 Tex. 690; or by eminent domain: *Ladd v. City of Boston*, 151 Mass. 585, 21 Am. St. Rep. 481. Whether the easement must be necessary to the enjoyment of the land conveyed, in order to pass by implication, is a question on which there is some conflict of opinion: See notes to *Elliott v. Rhett*, 57 Am. Dec. 762; *Mitchell v. Seipel*, 36 Am. Rep. 415. The case most often cited for the doctrine, that it is enough if the easement is apparent, is *Lampman v. Mills*, 21 N. Y. 505; but the authority of that case is no longer recognized, as to this particular point, in the court where it was decided. Thus in the recent case of *Wells v. Garbutt*, 132 N. Y. 430, it was ruled that, where the owner of two parcels of land conveys one by an absolute and unqualified deed, an easement would not be implied in favor of the land retained by the grantor as against the land conveyed to his grantee, unless the burden was not only apparent and continuous, but also strictly necessary to the enjoyment of the former. Judge Vann who wrote the opinion made the following remarks: "As a grantor cannot derogate from his own grant, while a grantee may take the language of the deed most strongly in his own favor, the law will imply an easement in favor of a grantee more readily than it will in favor of a grantor, and this distinction explains many of the apparent inconsistencies in the reported cases. Some learned judges in considering what may be termed an implied grant, as distinguished from an implied reservation, without, however, mentioning the distinction, have used language apparently applicable to all easements existing by implication, when in fact intended to be limited to those existing in favor of a grantee. Others, in deciding that an easement was impliedly created by a grant and conveyed to the grantee, have gone further in their discussions than the point involved required, and have broadly stated the rule to be reciprocal and applicable alike to benefits conferred and burdens imposed, provided the marks of either were open and visible. Such was the case of *Lampman v. Mills*, 21 N. Y. 505, where the discussion on the decision, for while it was decided that on the facts then appearing, an easement should be implied in favor of the grantee, against the grantor and his remaining lands, it was asserted that under like circumstances an easement would be implied in favor of the grantor against the grantee and his lands. The latter proposition was involved neither in the case decided, nor in any of those relied upon to support it, except such as have since been overruled, either expressly or impliedly." The court held in *Wells v. Garbutt*, 132 N. Y. 430, that

injunction had been rightly granted to restrain defendant from flooding certain land by restoring a milldam to the height at which it had stood before the mortgage had been given, the foreclosure of which had resulted in making the plaintiff the proprietor of the land alleged to be subject to the easement of flowage, there being no reservation of such easement in the mortgage, and no evidence adduced to show that the mill property was not worth substantially as much without the privilege contended for as with it. "While absolute physical necessity," said the court, "need not be shown, as in the case of landlocked premises, or the support of a wall, there must be a reasonable necessity, as distinguished from mere convenience," citing *Root v. Wadhams*, 107 N. Y. 384; *Hollenbeck v. McDonald*, 112 Mass. 247; *Brown v. Berry*, 6 Cold. 98; *Cooper v. Maupin*, 6 Mo. 624; 35 Am. Dec. 456. To the same effect is *Ellis v. Bassett*, 128 Ind. 118; 25 Am. St. Rep. 421. In Pennsylvania the question does not seem, with the exception referred to below, to have been directly discussed, but several cases prior to the principal one have laid down the rule quite broadly, that where a continuous and apparent servitude is imposed by the owner on one portion of his real estate for the benefit of another, a purchaser at private or judicial sale, in the absence of any express agreement or reservation, takes the property subject to that servitude: *Seibert v. Levan*, 8 Pa. St. 383; 49 Am. Dec. 525; *Overdeer v. Updegraff*, 69 Pa. St. 110; *Cannon v. Boyd*, 73 Pa. St. 179; and the rule has been stated in the same manner in several decisions in the lower courts of the same state. In *Rennyson's Appeal*, 94 Pa. St. 147, 39 Am. Rep. 777, however, it was denied that an easement of light and air could be implied, even by a grantee against a grantor who obstructed it, unless it was absolutely necessary to the enjoyment of the grantee's land. When taken in connection with the other rulings of the same court, this decision may perhaps be regarded rather as a result of the views generally held as to this particular easement in the United States — mainly on the grounds of public policy — than as a statement of a general principle, especially as it seems to go beyond the usual doctrine as to the requirement of necessity, in holding that the easement would not be implied even against a grantor. This inference is supported by the principal case, for it could scarcely be maintained that the easement of a projecting cornice is in any reasonable sense a necessary one, or that projecting eaves are needed for any purpose but drainage, which can easily be provided for in other ways, if a neighbor wishes to build up to the same height as the roof of an adjoining house. On the whole, then, it seems doubtful whether the New York doctrine as announced in *Wells v. Garbutt*, 213 N. Y. 430, can be regarded as having taken root in Pennsylvania.

HAUCK v. TIDEWATER PIPE LINE Co.

[158 PENNSYLVANIA STATE, 366.]

NUISANCE — ESCAPING OIL. — One who constructs a pipe line and tanks to be used in the transportation of oil from the oil regions to a railway track, is answerable to a landowner for injuries resulting from the oil percolating from such pipes through his ground and injuring his springs and lands and polluting the waters thereof, and cannot exonerate himself from liability by proving that neither he nor his agents were guilty of negligence.

ACTION to recover for injuries to land, spring, and fish pond from the percolating of oil. The defendant, without exercising the right of eminent domain, constructed a pipe line whereby it transported oil from the oil regions to a point near the line of plaintiff's land, from which oil was loaded upon tank cars for transportation by rail. Oil escaping from the defendant's pipes percolated through the ground inflicting the injuries complained of. The defendant requested the court to instruct the jury that no liability existed for oil escaping through its land without negligence on its part or the part of its agents. This request was refused. Verdict for the plaintiff.

James Ryon, for the appellant.

George M. Roads and J. W. Roseberry, for the appellees.

PAXSON, C. J. We will not consider the first three specifications of error, for the reason that they do not conform to the rules of court. We have made similar announcements so often within the last two or three years that it is difficult to understand why more attention is not paid to it.

The fifth specification alleges that the court below erred in declining to affirm the defendant's fourth point. The point was as follows: —

"That the defendant is not liable for damages resulting from its business by reason of oil escaping from its own lands where it is being handled, except such oil escapes through negligence of the company or its agents."

This point presents the main feature of the case. The court below refused it upon the ground, that it was a question of nuisance, and not of negligence, citing *Pottstown Gas Co. v. Murphy*, 89 Pa. St. 257, in support of this view. In that case it was held that the gas company was answerable for consequential damages, such as the corruption of the plaintiff's

ground and well, by the fluids percolating from the works; and that a corporation is exempt from consequential damages only where, being clothed with the state's right of eminent domain, it takes private property for public use, upon making proper compensation, and where such damages are not part of the compensation required.

We think the learned judge was right, under the authority above cited, in holding that this was not a case of negligence, but of nuisance or of consequential damages. For this reason we think that the case of *Pennsylvania R. R. Co. v. Lippincott*, 116 Pa. St. 472, 2 Am. St. Rep. 618, and of *Pennsylvania R. R. Co. v. Marchant*, 119 Pa. St. 559, 4 Am. St. Rep. 659, have no application. The railroad companies in those cases were clothed with the right of eminent domain, and were expressly authorized by law to construct their roads and operate them. It was held, therefore, that any injury resulting from such operation, without negligence and without malice, was *damnum absque injuria*. In the case in hand the company was clothed with no such powers. We think the case closely resembles that of *Robb v. Carnegie*, 145 Pa. St. 324, 27 Am. St. Rep. 694, in which it was held that the owners of coke ovens, the gases from which injured the growing crops upon the adjoining farm, were liable in damage to the owner of said farm for such injury. An attempt was made in that case, as it has been made in this, to bring it within the doctrine of *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126, 57 Am. Rep. 445. In the latter case the injuries complained of were the natural and necessary result of the development by the owner of the resources of his own land. In opening a drift for the purpose of mining coal, the mine water, impregnated with the impurities which it had taken up from the earth, coal, and other minerals in the mines, either flowed from the mouth of the drift, or was pumped from the mines, and allowed to take its natural course on its way to the ocean. It will thus be seen that the flow of mine water was the natural and necessary result of the development by the owner of his own property. This was not the case in *Robb v. Carnegie*, 145 Pa. St. 324, 27 Am. St. Rep. 694, nor is it the case here. In *Robb v. Carnegie* the refuse coal which was used for making coke was not mined upon the premises of the company, but was brought from other mines at a distance. In the case in hand the oil which was the cause of the injury to the plaintiffs' property, was brought from a distance, allowed to escape from the pipes, and to per-

colate through plaintiff's land and destroy his springs. It was not in any sense a natural and necessary development of the land owned by the company.

The appellants attempted to distinguish this case from *Robb v. Carnegie*, 145 Pa. St. 324, 27 Am. St. Rep. 694, by the fact that in the latter case the smoke and gases from the works were carried by the wind and lodged upon plaintiff's land, while in the latter case the escaping oil merely percolated through the soil until it reached plaintiff's springs. The essential difference between being carried through the air and percolating through the soil has not been made to appear. We regard it as a distinction without a difference.

As was correctly said by the learned judge in a portion of his charge embraced in the tenth specification: "If the mere fact that the business is a lawful business, and has been conducted with care, would be a defense where a neighbor's land had been injured in consequence of the business carried on there, the escape of gas for instance, or the escape of oil, the result would be that a man might lose his farm; might be compelled to leave it, and have no compensation, simply because the business which brought about this loss was a lawful business, and was carried on carefully. That is not the law. No man's property can be taken, directly or indirectly, without compensation under the law of this state. Hence there are cases, and a great many of them, where a defendant is held liable in damages, although his business is lawful, and he has exercised care in carrying it on."

In the consideration of this class of cases, care must be taken to distinguish between the natural and necessary development of the land itself, and injuries resulting from the character of some business not incident and necessary to the development of the land, or the minerals or other substances lying within it. The owner of the land has the right to develop it by digging for coal, iron, gas, oil, or other minerals; and if, in the progress of this development, an injury occurs to the owner of adjoining land, without fault or negligence on his part, an action for such injury cannot be maintained. If this were not so, a man might be utterly deprived of the use of his property. It is not so where the injury is caused by the prosecution of a business which has no necessary relation to the land itself, and is not essential to its development.

Judgment affirmed.

NUISANCES — POLLUTION OF SOIL BY ESCAPING OIL. — The general rule that a person who uses his property in such a manner as necessarily tends to injure the property of another is liable to that other for an injury which results from such use, without regard to considerations of care and skill therein, was elaborately discussed in *Cahill v. Eastman*, 18 Minn. 324, 10 Am. Rep. 184. That the lawfulness of a business carried on by the defendant is no defense to an action based upon his violation of the principle embodied in the maxim, *Sic utere tuo ut alienum non lædas*, see *Hurlbut v. McKone*, 55 Conn. 31; 3 Am. St. Rep. 17; *Fish v. Dodge*, 4 Denio, 311; 47 Am. Dec. 254; *People v. Cunningham*, 1 Denio, 524; 43 Am. Dec. 709; *State v. Yopp*, 97 N. C. 477; 2 Am. St. Rep. 305; *Norcross v. Thoms*, 51 Me. 503; 81 Am. Dec. 588; *Ross v. Butler*, 19 N. J. Eq. 294; 97 Am. Dec. 654; *Burditt v. Swenson*, 17 Tex. 489; 67 Am. Dec. 665; *City of Tiffin v. McCormack*, 34 Ohio St. 638; 32 Am. Rep. 408.

CONSEQUENTIAL INJURIES CAUSED BY WORK AUTHORIZED BY LAW cannot, as a general rule, be recovered for, unless there is negligence shown: See note to *Radcliff v. Mayor*, 53 Am. Dec. 366; *Taylor v. Baltimore etc. R'y*, 33 W. Va. 39; but it was held in *Bacon v. City of Boston*, 154 Mass. 100, that a statute empowering the city of Boston, for the protection of its water supply and the abatement of a nuisance, to take land at or near the line of a certain sewer, and to construct works for treating the sewage, and freeing it from noxious and offensive matters, and providing for compensation for the land so taken, did not authorize the city to create a nuisance to the neighboring estate of a private owner by offensive odors and filthy percolations into and through the soil.

STEWART v. MADDEN.

[153 PENNSYLVANIA STATE, 445.]

TRUSTS, DISCRETIONARY, POWER OF COURT TO CONTROL. — If a trust is created under which a trustee has power to use so much of the principal as he shall deem necessary for the benefit of the beneficiary, who has the power of absolute testamentary disposition of the residue, a legal discretion is vested in the trustee, which, in a proper case, the court may control for the benefit of the beneficiary.

TRUST PROPERTY, WHEN LIABLE FOR DEBTS OF BENEFICIARY AFTER HER DEATH. — If a wife conveys property in trust, giving the trustee authority to sell so much thereof as he shall deem necessary for her benefit, and reserves to herself the issues and profits of the estate held by the trustee, and the power of testamentary disposition of the residue, and, in the absence of such disposition, provides that such surplus shall vest in her children, the orphans' court may, after her death, direct the sale of the property subject to such trust, if required to pay debts incurred for necessities which her husband was unable to pay.

ORPHANS' COURT, COLLATERAL ATTACK UPON ORDERS OF. — An order of the orphans' court directing the sale of the real property of a married woman for the payment of her debts cannot be attacked collaterally nor by motion made after the lapse of several years to vacate such order.

EJECTMENT by a grantee of one of the heirs of Mrs. Letitia Robinson. The property in controversy had been conveyed

by her and her husband to Dr. Charles D. Everett, Jr., "to be held by the same Dr. Charles D. Everett for the following uses and trusts, to wit: To pay to the said Letitia Robinson the interest annually, and so much of the principal of said legacy from time to time as the said trustee shall deem necessary for the benefit of said *cestui que trust*, the balance remaining at her death to go to and be vested in such children as were born after the fourth day of October, 1853, in equal shares, the children of a deceased child born after the fourth day of October, 1853, if any, to take by representation of their ancestor. The said trustee to have power to invest the amount received under said last will and testament, and to change said investment at pleasure, in such manner and as often as he may think proper; and the said trustee to have power to sell and convey the said real estate in the lifetime of the said Letitia Robinson, and invest the proceeds in other real estate to be held in trust for the same purposes, or he may convert land into money, and appropriate the interest and principal as hereinbefore directed as to personal estate, or money into land, and hold the same subject to the same uses and purposes as hereinbefore prescribed as to real estate; and further, the said Dr. Charles D. Everett shall have power at any time he shall think proper to renounce the trust herein created, and to vest the same by deed in any other person he may select for the purpose, and by delivery and payment of said trust estate and property to said trustee, divest himself of the same, which said trustee thus appointed and invested with the trust shall hold the same, with the same proviso and for the same purposes as are hereinbefore set forth; and further, it is declared and provided that the rents, issues, and profits of the real estate held by the said trustee, or by anyone appointed by him, shall be subject to the right of the said Letitia to receive and enjoy, and to be for her sole and separate use during her natural life, and the same as well as the residue of the personal property mentioned in the deed remaining at her death shall be transferred and delivered to her children born after the said fourth day of October, 1853; in the absence of any testamentary provision by her, the children of any such deceased child, if any, to take by representation; but should she make a valid last will and testament, then the said real and personal estate to go to her devisees and legatees." After the making of this conveyance, Mrs. Robinson continued to reside on the land until her death in

1859. Thereafter, in 1862, her executors obtained from the orphans' court an order directing the sale of the property in controversy to pay her debts. Under this order, a sale was made and a deed executed in the same year to Charles Madden under whom the defendant claimed title. In the proceedings in the estate of Mrs. Robinson, the executor accounted for the fund derived from the sale of the property. The trial court entered judgment for the defendant. Plaintiff appealed.

Q. A. Gordon and S. H. Miller, for the appellant.

B. Magoffin and S. Griffith and Son, for the appellees.

STERRETT, J. In *Erisman v. Directors etc.*, 47 Pa. St. 509, a gift having been made in trust for a *feme covert* with discretionary power in the trustee to apply any part of the trust estate for the benefit of the *cestui que trust*, "if urgent necessity shall require," this court held: 1. That the discretion here given was but legal, and whenever the law determined that a proper case had arisen, in which the trustee's discretion should have been exercised in a particular way, he would be constrained to act in accordance therewith; and 2. That the adjudication of lunacy of the *cestui que trust* and the indigence of her husband, fixed the fact of "urgent necessity," and the consequent liability of the trust estate.

Substantially the same provision is made in Mrs. Robinson's conveyance. She expressly gave her trustee discretionary power to use "so much of the principal" of the trust estate as he "shall deem necessary for" her "benefit"; and, in harmony therewith, reserved to herself the power of absolute testamentary disposition of the residue. Here is a legal discretion which the court might, on presentation of a proper case, have constrained for the benefit of Mrs. Robinson. That such a case was presented to the orphans' court, in the proceedings for sale, seems clear. The adjudication that Mrs. Robinson had left unpaid debts implied that these were for necessities, and the order of sale that her husband was unable to pay them. This fixed the fact of "necessity," and the consequent liability of the trust estate; else debts could not have existed, nor sale have been made: Acts of 1848.

The plaintiff has no equity to sustain her claim of title. Her grantor's mother was the absolute owner of the land when she created the trust; and while, by her conveyance she divested herself of the legal title and active management, its

manifest purpose was to promote her own personal benefit. She expressly reserved: 1. The income; 2. The right to call on the principal in case of necessity; and 3. The power of absolute testamentary disposition of the residue. Thus, by the very terms of the conveyance, the whole estate could have been exhausted for her benefit in her lifetime, or bequeathed by her to a stranger. Then why should not the land have been liable for her debts? The interest of plaintiff's grantor was but contingent in his mother's lifetime; and plaintiff now stands here as a mere volunteer claiming through Mrs. Robinson's will. She does not deny that the debts for which the land now claimed by her was sold were Mrs. Robinson's, her grantor was a party to the proceeding, which judicially ascertained the existence of these debts, under which sale was made for their payment, and upon the faith of which defendant became the purchaser, paid the price and took possession. As was said in *Grindrod's Estate*, 140 Pa. St. 161: "Something is due to the finality of judgments. The orphans' court, after such a lapse of time (ten years) has no power, unless perhaps, in the case of a fraud practiced upon it, to set aside the sale and vacate its own decree. If it might do so after ten years it might do so after a hundred." Here thirty years have elapsed since the sale made under the order of the orphans' court, and the record so made remains unimpeached. If it is unimpeachable by direct application to the orphans' court, much less can it be nullified by collateral attack. The plaintiff's grantor had his day in the orphans' court, and his grantee, the plaintiff, is thereby estopped from claiming title as against this defendant.

This view renders unnecessary any discussion of the question upon which the argument of counsel mainly turned, whether or not a *feme covert* can by voluntary conveyance exempt her separate estate from her debts thereafter created.

Judgment affirmed.

TRUSTS. — RESTRAINTS UPON ALIENATION OF BENEFICIAL INTERESTS: See notes to *Lampert v. Haydel*, 9 Am. St. Rep. 366; *Smith v. Towers*, 9 Am. St. Rep. 405-408; *Garland v. Garland*, 24 Am. St. Rep. 686-697. If a statute provides that trust estates shall be liable for the debts of the *cetui que trust*, the same as if he had the legal title, the rights of the creditors will not be impaired by the fact that the trustee is invested with a discretion in the management and control of the estate, and as to the amount of the profits to be paid to the beneficiary, and the manner of paying them: *Marshall v. Bash*, 87 Ky. 116; 12 Am. St. Rep. 467. In the same state it is held that a testator cannot protect the estate devised by a provision that it shall "in

no way be liable for the debts" of the *cestui que trust*: *Rudd v. Hagan*, 86 Ky. 159; nor by declaring that such estate "shall not be subject to or liable for debts or liabilities" which the *cestui que trust* "may have or hereafter contract," and directing his executor to make such investments as he should deem advisable, and to pay annually to the devisee the profits of the estate: *Parsons v. Spencer*, 83 Ky. 305. In Pennsylvania a devise in trust, directing that the income of the property shall be held for the beneficiary so that it shall not be "liable to his debts, contracts, or engagements," will protect it against the claims of creditors, though there is also an alternative provision that the income may be paid to such persons as the *cestui que trust* shall authorize to receive it. Such a provision is construed to mean that the beneficiary shall have a right to appoint an agent to receive it for his use, and not that he may transfer to another his right to the use of the income: *Mehaffey's Estate*, 139 Pa. St. 276.

JUDICIAL SALES ARE NOT COLLATERALLY IMPEACHABLE: See *Phillips v. Coffee*, 17 Ill. 154; 63 Am. Dec. 357; *Cocky v. Cole*, 28 Md. 276; 92 Am. Dec. 683; *Chautauqua County Bank v. White*, 6 N. Y. 236; 57 Am. Dec. 442; *Evans v. Robberson*, 92 Mo. 192; 1 Am. St. Rep. 701; *Curran v. Kuby*, 37 Minn. 330; *Burris v. Adams*, 96 Cal. 664; *Lyles v. Haskell*, 35 S. C. 391.

HARTTRANFT'S ESTATE.

[153 PENNSYLVANIA STATE 530.]

COLLATERAL SECURITIES — STATUTE OF LIMITATIONS. — A deposit of collaterals does not prevent or impede the running of the statute of limitations upon the debts secured thereby, but the barring of any action upon such debt through the running of the statute of limitations does not affect the right of the pledgee to hold and realize upon the collateral, nor of the pledgor to call for any surplus remaining after the principal debt has been paid.

STATUTE OF LIMITATIONS — RENEWAL OF DEBT BY NEW PROMISE. — An oral promise to make a renewal of a debt, or to waive the statute of limitations by a writing to be executed in the future, will not amount to a renewal or a waiver when it appears that the instrument was prepared but its execution was postponed from time to time and finally left undone.

AUDIT of an account against the estate of John F. Harttranft, deceased.

J. P. H. Jenkins, and I. P. Wanger, C. H. Stinson, Irwin P. Knipe, and B. E. Chain, for the appellee.

John G. Johnson, and Charles Hunsicker, for the appellant.

WILLIAMS, J. The appellant held at least three notes made by General Hartranft, for several years before his death. One of these for ten thousand dollars (\$10,000), dated September 19, 1883, payable on demand, was accompanied by cer-

tain mining stocks as collateral. Another for sixty-two thousand seven hundred seventy-two dollars and eighty-one cents, dated January 31, 1884, payable on demand, was also accompanied by similar collaterals. The date and amount of the third note does not appear in the evidence, but it was indorsed by Michael Schall. This note was renewed on the tenth day of March, 1889, for thirteen thousand dollars and was signed by both Hartranft and Schall, as makers. Hartranft died October, 1889. Some time after his death the last note was paid by Schall. The other notes were not paid. In 1891 they were presented to the auditor appointed to make distribution of the fund raised by the administratrix of General Hartranft, as subsisting demands against the estate, entitled to participate in the fund. Their right to share in the distribution was denied on the ground that they were barred by the statute of limitations. The appellant replied that notwithstanding the lapse of more than six years from the date of the notes, the statute could not be successfully set up against them, because: 1. Securities had been deposited with the company as collateral to the notes, which remained in its hands unconverted; and the statute did not begin to run on the notes until the collaterals were collected, or converted, or had been returned to the maker; and 2. If this was doubtful, the notes had been saved from the operation of the statute by an acknowledgment and promise to pay made within six years.

The first of these positions raises a question of law that has been already settled. The statute operates upon the remedy and begins to run when a right of action accrues. Upon a note payable on demand an action may be brought at once: *Milne's Appeal*, 99 Pa. St. 483; *Boustead v. Cuyler*, 116 Pa. St. 551. The statute, therefore, begins to run upon such a note at date. But upon a deposit of money made to be drawn upon in the future a right of action does not accrue until a demand is made. The same rule applies to the deposit of securities as collateral to an existing debt. Possession of them for six years will not give to the pledgee a title, or bar the remedy of the pledgor: *Finkbone's Appeal*, 86 Pa. St. 368. As no right of action exists until the securities are converted or their return has been properly demanded, the statute does not begin to run against the pledgor until his right of action accrues: *Humphreys v. County Nat. Bank*, 113 Pa. St. 417. The holder of a note with whom collaterals have been de-

posited has, while the statute is running, two remedies. One against the maker by suit, the other against the collaterals. If he loses the first by the lapse of time, he still has the second. He may not sue the maker, but he may exhaust the securities he holds in pledge; for the statute operates not upon his debt but upon his right of action. The deposit of collaterals has therefore no effect to prevent the running of the statute against the right of action: *Slaymaker v. Wilson*, 1 Pen. & W. 216. The pledge survives though the right of action is gone; and if the creditor realizes from the collaterals more than the amount of his debt, the debtor may call upon him for the surplus. He cannot however demand a return of the collaterals until the debt has been paid, notwithstanding the statute may have run upon his creditor's right of action against him. This is the fair effect of the cases in England and in most of the states in this country: 13 Am. & Eng. Ency. of Law, 705, note 1.

The remaining question is whether an acknowledgment sufficient to toll the statute is shown by the evidence? The witness on whose testimony this question depends says: "The General never disputed the correctness of these notes and expressed his willingness to pay if he was able." Again: "He admitted the debt and said, have new notes fixed and he would fix it when he came in again." And again: "He said he would sign new notes. He said he would renew this indebtedness." Nevertheless he did not renew the notes; and the witness from whom we have quoted said: "I can't tell why he did not sign the notes; he put it off from time to time." The witness's opinion that he did not deny his liability or that he admitted it, will not do unless the words on which that opinion is based are given, so that the court and jury may determine whether the opinion is well founded. A conditional or qualified promise, without more, will not toll the statute. A promise to make a renewal note or to waive the statute by an instrument in writing to be executed in the future, will not amount to a renewal or a waiver when it appears that the instrument was prepared, but its execution postponed, or "put off from time to time," and finally left undone. Then too the bank held three notes when these conversations took place. One of these was renewed a few months before the General's death. Was this the extent to which he intended to renew his liability? He did not sign the other renewals when his attention was called to them, but

"put it off from time to time." The promise to renew is too indefinite to enable us to determine with certainty what was its scope; and, when we consider the subject in the light of his conduct, we cannot say, that the court below erred in the conclusion that no sufficient acknowledgment or promise is shown to have been made by General Hartranft to toll the statute.

We think the case was well decided by the learned judge of the court below, and the decree appealed from is now affirmed at the cost of the appellant.

COLLATERAL SECURITIES—RUNNING OF STATUTE OF LIMITATIONS NOT PREVENTED BY DEPOSIT OF. — The rights of a creditor who holds collateral securities for a debt, against which the statute of limitations has run, are discussed in the monographic note to *Griggs v. Day*, 32 Am. St. Rep. 716. As to the doctrine stated in the principal case that the pledgee cannot claim adversely the collateral securities which he holds, nor acquire a title thereto by the lapse of time merely, see *Cross v. Eureka etc. Canal Co.*, 73 Cal. 302, 2 Am. St. Rep. 808. The surplus of money collected on a note deposited as collateral security is money had and received to the use of the pledgor, and must be accounted for: *Hunt v. Nevers*, 15 Pick. 500; 26 Am. Dec. 616; and if the creditor's claim is satisfied, he must release or reassign the collaterals. *Wallace v. Finnegan*, 14 Mich. 170; 90 Am. Dec. 243.

STATUTE OF LIMITATIONS. — EFFECT OF ACKNOWLEDGMENT OF DEBT TO SUSPEND RUNNING OF: See, generally, notes to *Conway v. Williams*, 29 Am. Dec. 467, 468; *Shoemaker v. Benedict*, 62 Am. Dec. 101, 102; *Allen v. Collins*, 35 Am. Rep. 417-420; *Landis v. Roth*, 58 Am. Rep. 749-751; *Spangler v. Spangler*, 9 Am. St. Rep. 116; *Linderman v. Pomeroy*, 24 Am. St. Rep. 496; *State v. Finn*, 14 Am. St. Rep. 660. A writing, to constitute an acknowledgment sufficient to take a debt out of the statute, must recognize the debt as existing, and contain nothing inconsistent with an intention on the part of the debtor to pay it: *Manchester v. Braedner*, 107 N. Y. 346; 1 Am. St. Rep. 829. It must also be clear and unambiguous, and must recognize and be directed to the debt with sufficient clearness to amount to an unqualified admission that the debt remains due and unpaid: *Macrum v. Marshall*, 129 Pa. St. 506; 15 Am. St. Rep. 730. Where one of the makers of a note said to the executor of the owner: "In case they (the other makers) don't pay it, let me know it, then I will pay it; I don't want to have any trouble any further," it was held that the words of the promise were sufficiently distinct and unequivocal to toll the bar of the statute: *Croman v. Stull*, 119 Pa. St. 91. Expressions so vague and indeterminate as to lead to probable inferences only are not enough: *Smith v. Fly*, 24 Tex. 345; 76 Am. Dec. 109. The promise must also be unconditional and unqualified: *Mellick v. De Seelhorst*, Breese, 221; 12 Am. Dec. 172; *Mumford v. Freeman*, 8 Met. 432; 41 Am. Dec. 532; *Kensington Bank v. Patton*, 14 Pa. St. 479; 53 Am. Dec. 564; *Pritchard v. Howell*, 1 Wis. 131; 60 Am. Dec. 353; *Harlan v. Bernie*, 22 Ark. 217; 76 Am. Dec. 428; *Pierce v. Seymour*, 52 Wis. 272; 38 Am. Rep. 737; *Chapman v. Barnes*, 93 Ala. 433; *McCormick v. Brown*, 36 Cal. 180; 95 Am. Dec. 170; *Batchelder v. Batchelder*, 48 N. H. 23; 97 Am. Dec. 569. Therefore a promise to pay "when able" is not enough to toll the bar of the stat

note: *Richardson v. Bricker*, 7 Col. 58; 49 Am. Rep. 344; *Parker v. Butterworth*, 46 N. J. L. 244; 50 Am. Rep. 407. Though the statute requires the promise to be writing, yet a verbal promise is effectual to remove the bar if the evidence of such verbal promise is not objected to by the defendant: *Ray v. Rood*, 62 Vt. 293.

YERKES v. RICHARDS.

[153 PENNSYLVANIA STATE, 646.]

SPECIFIC PERFORMANCE — MUTUALITY OF CONTRACT. — Though, because of the coverture or infancy of one of the parties to an executory contract, it is not enforceable against her, yet if she performs or tenders performance of her part of the contract, equity will at her instance compel performance by the other contracting party.

CONTRACTS, OPTIONAL — DAMAGES FOR FAILURE TO PERFORM. — If a landowner makes an agreement purporting to give A B, agent, the right to purchase certain real property on or before a time and at a price designated in the agreement, the wife of such agent may maintain an action against such landowner for damages, on proving that the option was taken for her benefit, and that within the time stipulated she tendered the price named.

ACTION by and in the name of William H. Yerkes, agent for Emily Irene Yerkes, to recover damages for breach of a contract of sale. The contract in question was executed June 14, 1890, by the defendant, Richards, who by it agreed that he would on or before January 1, 1891, convey to second party a certain tract of land, provided second party should have paid therefor five thousand four hundred dollars in the manner stated in such agreement. The court directed a judgment of nonsuit against the plaintiff, who thereupon appealed.

Joseph Mellors and J. P. H. Jenkins, for the appellant.

N. H. Larzelere and M. M. Gibson, for the appellee.

DEAN, J. On the 14th of July, 1890, the defendant, William W. Richards, and William H. Yerkes, agent, made an agreement, known as an "option," for the purchase of a tract of forty-five and five tenths acres of land in Upper Merion township, Montgomery County.

Richards covenanted to convey to Yerkes, agent, or his assigns, on or before the first day of January, 1891, the tract of land. Yerkes, agent, covenanted to pay therefor the sum of five thousand four hundred dollars (\$5,400), two thousand nine hundred dollars on delivery of deed, and the balance, two thousand five hundred dollars, in one year, with interest

at five per cent. Then follows the optional clause in these words:—

“Provided, however, and it is hereby expressly understood and agreed that this contract shall be null and void, and of none effect as to either party, the same as if the said contract had never been made, if the said purchase money shall not be paid on or before January 1, 1891.”

The agreement was sealed by William W. Richards, executor, and William H. Yerkes, agent, and delivered to Yerkes.

On the 9th of September, 1890, Yerkes made a legal tender to Richards of the whole consideration, five thousand four hundred dollars, and requested a conveyance. Richards refused to accept the money or to execute a deed for the land, and sold and conveyed it to one Samuel Moore, it is alleged, at a higher price. Thereupon Yerkes, naming himself as agent for Emily Irene Yerkes, brought this suit to recover damages for breach of the contract to convey.

The plaintiff, in his statement of claim under the procedure act of 1887, sets out in full: 1. The articles of agreement; 2. Willingness and offer to pay, and the tender of September 9, 1890; 3. Refusal of defendant to receive the money and execute conveyance; 4. That defendant, for purpose of obtaining greater price, had sold and conveyed the land to one Samuel Moore; 5. An averment that by reason of this breach of contract, plaintiff had sustained damage in amount of twenty thousand dollars.

To this statement defendant pleaded *non assumpsit*, and also filed affidavit of defense, and on the issue thus made up they went to trial before court and jury.

The plaintiff's first and only witness was William H. Yerkes, who testified, among other matters, that he purchased the property as agent for his wife, Emily Irene Yerkes; then an offer was made of the agreement. To this offer the defendant objected, on the ground of want of mutuality between the parties, and because no right of action had been shown in Emily Irene Yerkes. The court sustained the objection, and also ruled out any evidence of the breach of contract by defendant, or of damages sustained by plaintiff, and entered a compulsory nonsuit. Plaintiff afterward moved to take off the nonsuit; this the court, in an opinion filed, refused to do. Thereupon the plaintiff took this writ, assigning for error: 1. The rejection of the agreement; 2. The refusal of the court to take off the nonsuit.

The action of the court in each instance was based on the ground of want of mutuality in the contract. It was assumed that as the plaintiff, William H. Yerkes, had executed a sealed contract as agent, without disclosing his principal, Emily Irene Yerkes, in the instrument, and without showing authority to bind her, a *feme covert*, by deed, she was not bound; therefore, as the contract was not mutually obligatory, it could not be enforced against the grantor, Richards. We are of opinion this equitable rule has no application here. Where there are mutual covenants stipulating reciprocal benefits in an executory contract, yet the contract as to one is not enforceable because of infancy, coverture, or other disability to contract, equity will not enforce it against the other. Even in such cases, however, where the one under legal disability has performed, equity will compel performance on part of the other: *Walker v. Coover*, 65 Pa. St. 430. Here, it was alleged, Mrs. Yerkes had performed her part of the contract, or had done what equity deems equivalent, offered to perform, had made a legal tender of the full amount of purchase money.

But, leaving out of view this question, we think there was no want of mutuality in this contract, either because of defective execution, or because Emily Irene Yerkes was *covert*, which would prevent plaintiff's suit on it. The contract was a written option to William H. Yerkes, agent, to purchase the land at the price of five thousand four hundred dollars, to be paid on or before the first day of January, 1891. An option is an unaccepted offer to sell. By the express terms of this contract there was to be no right of action against either the agent or principal; nor was it for that reason a hard or unconscionable bargain which it was against equity to enforce, for it was just such an option, or offer to sell, as a prudent landowner may and often does make for his own advantage. In such a contract, if the optional price be an adequate one, and the party to whom the offer is made be without ready money, yet have the tact and energy to secure a purchaser at a higher figure, both are the gainers. If the offer be not accepted by the party to whom it is made within the time stipulated, the owner has lost nothing; but even if not mutual, in the sense of equality of benefit, that is not the mutuality which stands in the way of an enforcement; to bring it under this rule there must be want of mutuality in the remedy. Here, the contract was signed by the grantor, the party to be charged; admit there was no sufficient authority in the agent, the sig-

nature of the other party was wholly unnecessary, and in no way helped to perfect the contract; it was signed by the party to be charged, and delivered to the other. The plaintiff would have been in no better position if full authority had been given the agent to execute it, and he had sealed it in name of the principal; for by the express terms of the contract only Richards was to be bound. He made a written offer to Yerkes, agent, to sell to him or his assigns, and stipulated the offer was to remain open to him for acceptance until the 1st of January following. The only mode of signifying acceptance was payment of the five thousand four hundred dollars purchase money. If not paid within time, the option ended, the offer was withdrawn. Of what remedy was he deprived by reason of insufficient authority in the agent, or of disability to contract in Mrs. Yerkes? Clearly, none. As by his own contract he acquired no right to vindicate, neither absence of authority to the agent, nor coverture of the principal, could bar him of a suit on the contract, when he, in effect, stipulated he would never bring one. His refusal to accept the only benefit he was to get under the contract, the money, and which he covenanted to accept if tendered while the offer was pending, that moment gave the other party a right of action, not because she was bound, but because he was. His refusal to accept was wholly in disregard of her legal right to pay, and has very much the appearance of unfair dealing.

This whole subject of the nature of the mutuality between the parties in options for the sale of land is so fully discussed in *Corson v. Mulvany*, 49 Pa. St. 88, 88 Am. Dec. 485, followed in *Smith's Appeal*, 69 Pa. St. 474, and now followed in this decision, that further repetition would serve no good purpose.

We decide that plaintiff's first and second assignments of error are sustained.

As to the form of the action objected to by defendant, it is immaterial in the present condition of the record. If the evidence had been admitted, and it had been shown that the offer was in fact to Mrs. Yerkes through her agent, and had been accepted by her, the legal plaintiff should have been Emily Irene Yerkes, and her right to amend so as to have the record accord with the proof could not have been denied. If William H. Yerkes acted without her authority, either precedent or subsequent by ratification, then he had a right of action in his own name. This can only be determined when

the court has before it plaintiff's full case on all the material evidence to be offered.

The assignment of error, that no exception was taken to judgment of court refusing to take off nonsuit, has not been noticed, because the exception in form has been filed since the record was made up in common pleas.

The judgment of the court below refusing to take off nonsuit is reversed, and *procedendo* is awarded.

VENDOR AND PURCHASER — OPTIONS. — Agreement optional as to one party and obligatory as to the other is deemed mutual, and may be enforced by the former: *Cherry v. Smith*, 3 Humph. 19; 39 Am. Dec. 150; *Warren v. Costello*, 109 Mo. 338; 32 Am. St. Rep. 669. An optional contract for the purchase of land signed by the vendor alone may be enforced by the vendee, under a statute of frauds not requiring the writing to be signed by the party sought to be charged, but only by the party by whom the sale is made: *Ida v. Leiser*, 10 Mont. 5; 24 Am. St. Rep. 17. An option is not a chose in action nor a transmissible right of property, but a mere personal privilege which ceases with the death of the person who has the right to exercise it: *Newton v. Newton*, 11 R. L. 390; 23 Am. Rep. 476; nor does it vest any interest in the proposed vendee, since it becomes binding only by acceptance or performance of the conditions before the offer is withdrawn: *Gustin v. Union School Dist.*, 94 Mich. 502; *ante*, p. 361, the note to which cites other cases relating to this subject. The vendor's refusal to accept the consideration will not destroy the mutuality of such a contract, although the vendee might, upon such refusal, have retracted his election: *Corson v. Mulvany*, 49 Pa. St. 88; 88 Am. Dec. 485.

SPECIFIC PERFORMANCE, COVERTURE AS A DEFENSE TO SUIT FOR. — Whether a contract entered into by a husband to sell his wife's land could be specifically enforced was considered doubtful in *Watts v. Kinney*, 3 Leigh, 272, 23 Am. Dec. 266, there being no mutuality in such a contract, inasmuch as it could not be enforced against the wife at the suit of a purchaser. Under the Missouri statutes (Rev. Stats. 1889, secs. 2396, 2397) a married woman may be compelled to perform specifically a contract for the sale of her legal estate in land: *Buck v. Brown*, 101 Mo. 566.

C

CASES
IN THE
SUPREME COURT
OF
SOUTH CAROLINA.

KOHN v. RICHMOND AND DANVILLE R. R. Co.

[37 SOUTH CAROLINA, 1.]

COMMON CARRIERS — DUTY TO DELIVER GOODS TO TRUE OWNER UPON DEMAND. — A common carrier receiving goods for transportation from one person, giving him a bill of lading therefor, is not bound to deliver them upon demand to a third person claiming to be their true owner; and a refusal to so surrender will not make the carrier liable for the conversion of such goods at the suit of such third person. In such case the carrier may, however, if it chooses to do so, deliver the goods to the rightful owner, and then defend an action brought against him by his bailor to recover for their nondelivery by showing such delivery.

COMMON CARRIERS — DUTY TO DELIVER GOODS TO TRUE OWNER UPON DEMAND UNDER LEGAL PROCESS. — A common carrier receiving goods for transportation from one person is guilty of conversion in failing to deliver to their true owner, upon demand, only when such demand is made under and accompanied by legal process.

COMMON CARRIERS — DUTY TO SURRENDER GOODS TO MORTGAGEE AFTER CONDITION BROKEN. — When, after goods are received from a mortgagor by a common carrier for transportation, their possession is demanded by an agent of the mortgagee claiming the latter to be the true owner, a refusal by the carrier to surrender the possession does not constitute a conversion of the goods; nor does the presence and silence of the mortgagor, when such demand is made and refused, constitute such an admission of the mortgagee's ownership as makes it the duty of carrier to deliver the goods under such demand.

J. F. J. Caldwell, for the appellant.

George S. Mower, for the appellee.

McIVER, C. J. The plaintiffs bring this action to recover damages for the conversion of certain personal property, alleged to belong to plaintiffs. The facts may be briefly stated as follows: On the 18th of October, 1887, one Clendenning

delivered to the agent of defendant company at Prosperity the property in question, consisting of a lot of household goods, to be shipped by defendant's train to Laurens. After said agent had received and receipted for said goods, defendant's agent was notified by an agent of plaintiffs not to ship said goods, as they belonged to plaintiffs under a mortgage given by Clendenning to plaintiffs, the condition of which had been broken. The goods were, however, placed on the cars, and the cars sealed. Soon after this, and just before the arrival of the train for Laurens, one Hair, a constable, appeared at the depot with the mortgage, upon which an indorsement had been made by a trial justice, purporting to authorize said Hair to take possession of the goods, and demanded them from defendant's agent, who refused to deliver them upon the ground that the paper was not sufficient—"that I ought to have had a distress warrant." Clendenning was present at the time, but so far as appears from the evidence, neither said nor did anything. The goods remained at the depot, in the car in which they had been placed the evening before, until one o'clock the next day, when they were sent on to Laurens, no further steps having in the meantime been taken by plaintiffs to obtain possession of said goods. The mortgage above spoken of was given by Clendenning to the plaintiffs to secure the payment of a note which fell due on the 1st of May, 1887.

The plaintiffs having obtained judgment for the value of the goods, defendant appeals upon the several grounds set out in the record, which need not be specifically stated, as the case turns upon the single question, whether a common carrier who has received goods for transportation from one person, and given him a bill of lading therefor, is bound to surrender them upon demand to a third person who claims to be the true owner thereof, under pain of being liable to an action for the conversion of said goods at the suit of such third person.

It is conceded that, under the stringent rule of the common law, a common carrier is liable as an insurer for goods committed to his charge for transportation, and nothing but the act of God or the public enemies will excuse him for failure to deliver the goods at their destination to the person to whom he has contracted to deliver them, the consignee. Under this rule it is very obvious that the carrier would be liable to his bailor, even if the goods were taken from his possession by process of law, and much more so if he voluntarily delivered

them to the true owner; for this would not be either the act of God or of the public enemy. But it is claimed, and we think justly, that this stringent rule has been modified so as to excuse the carrier from liability, where the goods have been taken from his possession by process of law; provided the carrier gives prompt notice of such seizure to his bailor; for as it is well put by Campbell, C. J., in *Pingree v. Detroit etc. R. R. Co.*, 66 Mich. 143, 11 Am. St. Rep. 479: "If he is excusable for yielding to a public enemy, he cannot be at fault for yielding to actual authority what he may yield to usurped authority": See also, *Stiles v. Davis*, 1 Black, 101, and the same doctrine is, at least, impliedly recognized, though the point was not distinctly raised in our own case of *Faust v. South Carolina R. R. Co.*, 8 S. C. 118.

It is also contended that the rule is still further modified so as to excuse the carrier from liability to his bailor for the non-delivery of goods intrusted to him for transportation, if he can show that he has delivered the goods to a third person, who was the true owner, and entitled to the possession thereof; and the case mainly relied upon to establish this proposition is *The Idaho*, 93 U. S. 575, though there are cases which have been decided in several of our sister states, recognizing the same doctrine. In our own state, however, we have no case, so far as we are informed, which recognizes this modification of the rule as to a carrier's liability. It is true, that the case of *Robertson v. Woodward*, 3 Rich. 251, does seem to recognize the doctrine that an ordinary bailee — not a common carrier — may dispute the title of his bailor in an action of trover brought by the latter, by showing that his bailor had sold the subject of the bailment, before the bailment arose, and that defendant was authorized to defend the action for the benefit of the purchaser. But it seems to us somewhat difficult to reconcile that case with the previous case of *Manning v. Norwood*, 2 Mill Const. 374.

Be that as it may, however, and assuming, for the purposes of this case, that the stringent rule of the common law as to a carrier's liability has been thus further modified, as contended for by respondents, the question still remains, whether the rule thus modified applies to this case. It will be observed that the cases which establish or recognize this modification of the rule only go to the extent of holding that a common carrier may deliver the goods intrusted to him for transportation to the rightful owner upon his demand; and if he does,

he may defend himself against an action brought by his bailor to recover damages for the nondelivery according to the contract of bailment, by showing that he has delivered the goods to the rightful owner; but none of them go to the extent of holding that he is bound to deliver them to one who demands them as rightful owner, unless it be the case of *Wells v. American Express Co.*, 55 Wis. 23, 42 Am. Rep. 695. In that case, a package of money was intrusted to the carrier, to be delivered to Wells and Cartwright. When the package addressed to Wells and Cartwright reached its destination, the money was demanded by Wells alone, he claiming to be the sole owner, and that Cartwright had no interest in it; to which Cartwright, being present, assented verbally, though "there was no assignment by Cartwright of his apparent interest in the package to Wells, and no written order by Cartwright to deliver to Wells, and no offer of any receipt or acquittance from both." The defendant refused to deliver the money to Wells alone, and insisted, also, that the money had been subjected to garnishee proceedings against Cartwright. Wells then brought his action, not upon the bill of lading or express receipt, but for money had and received; and the court held that, "irrespective of the garnishment," the plaintiff, having established his individual right to the money, was entitled to recover. The authorities cited by the learned judge, while they do establish the doctrine that a common carrier may, with safety, deliver to the rightful owner, do not establish the doctrine that he is bound to do so; and his assumption that the one follows from the other is not, in our judgment, well founded. In addition to this, the action in that case was for money had and received, which does not necessarily imply a tort on the part of the defendant, while here the action is for the conversion of the goods, which does involve the idea of tort. Again, in that case, it appeared that Cartwright, one of the persons named as consignee, was not only present when Wells, the other consignee, demanded the money, claiming it as his individual property, but actually assented to such claim, and hence the carrier had no excuse for refusing to comply with the demand.

It seems to us that the whole case turns upon the question, whether a carrier, resting under very stringent obligations to his bailor, is bound to assume the burden, where a third person makes a demand upon him for goods intrusted to him for transportation, not enforced by legal process, of showing, not

only that such third person is the rightful owner, but is also entitled to the immediate possession of the goods. It seems to us that common justice would require that such burden should be assumed by the claimant, who is most likely to have the means of meeting it, and not upon the carrier, who cannot be supposed to know anything about the real ownership of the goods, and has a right to assume that the person from whom he received possession of the goods was such rightful owner, possession of personal property being evidence of title. The most that could be properly required of the carrier would be to hold the goods, notifying his bailor of the demand which had been made upon him, and let the claimant contest with the bailor the question of ownership.

Under these views, we do not think that the judgment below can be sustained. The goods were not seized or demanded under any legal process. The fact that the person selected as the agent of plaintiffs to enforce their mortgage claimed to be a constable, cannot affect the question; for even where a mortgage of personal property is placed in the hands of the sheriff, with instructions from the mortgagee to seize and sell the mortgaged property, the sheriff does not act officially, but merely as the private agent of the mortgagee: *Robins v. Ruff*, 2 Hill (S. C.), 406.

It is claimed, however, that the bailor, Clendenning, being present when the goods were demanded of the defendant's agent by the agent of the plaintiffs, and saying nothing, was an admission that plaintiffs were the rightful owners and entitled to the immediate possession of the goods, and, therefore, defendant had no excuse for refusing to comply with the demand. We cannot take that view. We do not see what obligation rested upon him to interpose in the colloquy between the agents of plaintiffs and defendant. He delivered the goods for shipment to the defendant, and held its bill of lading, obligating defendant to deliver them according to its terms, and there was no occasion for him to speak. If he had stood silently by, and allowed the defendant to deliver the goods to plaintiffs, claiming to be the rightful owners, without protest or objection, we can very well see how he might have been estopped from subsequently claiming them from defendant; but we do not see how his silence, when plaintiffs were making an unsuccessful demand on defendant, could possibly affect the question involved here.

The judgment of this court is, that the judgment of the cir-

cuit court be reversed, and that the case be remanded for a new trial.

McGOWAN, J. The amount involved in this case is not large, but the principle is important. After careful consideration, it seems to me, that when a common carrier is intrusted with property for transportation, his first responsibility is to the person who has intrusted him with the property; and, upon claim of the property by a third party, that he should not be required, at his risk, to judge between the parties as to the ownership of the property. He should, however, always and at once yield to the force of legal process, which intervenes and takes the property, thus relieving the carrier from the responsibility of being judge in the matter. I have not been able to satisfy myself that the paper presented to the official of the railroad in this case was, in the proper sense, legal process. "It seems to have been a simple mortgage of personal property, after condition broken, but there was about it none of the usual *indicia* of legal process, such as a summons, warrant, writ, or seal of the court. It did not appear that there had been any judicial determination of the matter, and the paper was in the hands of one who, on the occasion, was acting merely as the agent of the mortgagees. For this reason I concur in the opinion of the chief justice.

POPE, J. I dissent, and will file a dissenting opinion.
Judgment reversed.

Common Carriers and Adverse Claimants.*

Common Carriers — Duty and Liability when Adverse Claim is Set Up to Property Received for Transportation. — A common carrier receiving goods from a shipper for transportation becomes a bailee, and as against such shipper, who has possession of the goods at the time of their delivery, the carrier cannot avail himself of the title of a third person, even though such third person be the true owner, in order to gain title for himself, nor in any case where he has not yielded to a paramount title. On the other hand, he is excused from liability to deliver the goods to the consignee, or to return or account for them to the shipper, when he has in good faith delivered them to the true owner upon the demand of the latter. Hence a common carrier may excuse himself from liability by showing that he has actually delivered the goods to the true owner upon demand, even though such delivery is not according to the consignor's directions or the bill of lading. Whenever the shipper has obtained the possession of the goods which he gives to the carrier by fraud practised upon the true owner, or where he mistakenly supposes he has legal rights in the property so delivered, he cannot complain because

* REFERENCE TO MONOGRAPHIC NOTE.

Common carrier, right to retain goods against owner, when possession was not taken from him: 40 Am. Dec. 44, 45.

the carrier has delivered the property to its true owner at his demand: *The Idaho*, 93 U. S. 575; *King v. Richards*, 6 Whart. 418; 37 Am. Dec. 420; *Rosenfield v. Express Co.*, 1 Woods, 131; *Western Transportation Co. v. Barber*, 56 N. Y. 544; *Hayden v. Davis*, 9 Cal. 573; *Young v. East Alabama Ry Co.*, 80 Ala. 101; *Wolfe v. Missouri Pac. R'y Co.*, 97 Mo. 473; 10 Am. St. Rep. 331; *American Express Co. v. Greenhalgh*, 80 Ill. 68; *Sheridan v. New Quay Co.*, 4 Com. B., N. S., 617. In the leading case of *The Idaho*, 93 U. S. 575-579, Mr. Justice Strong, in delivering the opinion of the court, said: "When the bailee has actually delivered the property to the true owner, having a right to the possession on his demand, it is sufficient defense against the claim of the bailor. If it be said that by accepting the bailment the bailee has estopped himself against questioning the right of his bailor, it may be remarked in answer that this is assuming what cannot be conceded. Undoubtedly the contract raises a strong presumption that the bailor is entitled; but it is not true that thereby the bailee conclusively admits the rights of the principal. His contract is to do with the property committed to him what his principal has directed, to restore it or to account for it. And he does account for it when he has yielded it to the claim of one who has a right paramount to that of his bailor. If there is any estoppel, it ceases when the bailment on which it is founded is determined by what is equivalent to an eviction by title paramount; that is, by the reclamation of possession by the true owner. Nor can it be maintained, as has been argued in the present case, that the carrier can excuse himself for failure to deliver to the order of the shipper only when the goods have been taken from his possession by legal proceedings, or where the shipper has obtained the goods by fraud from the true owner. It is true that in some of the cases fraud of the shipper has appeared, and it has sometimes been thought it is only in such a case, or in a case where legal proceedings have interfered, that the bailee can set up the *jus tertii*. There is no substantial reason for the opinion. No matter whether the shipper has obtained the possession he gives to the carrier by fraud practised upon the true owner, or whether he mistakenly supposes he has rights to the property, his relation to his bailee is the same. He cannot confer rights which he does not himself possess, and if he cannot withhold the possession from the true owner, one claiming under him cannot. The modern and best-considered cases treat as a matter of no importance the question how the bailor acquired the possession he has delivered to his bailee, and adjudge that if the bailee has delivered the property to one who has a right to it as the true owner, he may defend himself against any claim of his principal. . . . We do not deny the rule that a bailee cannot avail himself of the title of a third person, though that person be the true owner, for the purpose of keeping the property for himself, nor in any case where he has not yielded to the paramount title. If he could, he might keep for himself goods deposited with him without any pretense of ownership. But if he has performed his legal duty by delivering the property to its true proprietor at his demand, he is not answerable to the bailor; and there is no difference in this particular between a common carrier and other bailees." Again, in *King v. Richards*, 6 Whart. 418, 37 Am. Dec. 420, the court used this language: "It may be correct enough to hold that when the real owner does not appear and assert his right, the carrier or bailee shall not be permitted of his own mere motion to set up as a defense against his bailor such right for him. But it would be repugnant to every principle of honesty to say that after the right owner has demanded the goods of the bailee, he shall not be permitted, in any action brought

against him by the bailor of the goods, to defend against his claims by showing clearly and conclusively that the plaintiff acquired the possession of the goods tortiously and feloniously, without having obtained any right thereto. As a general rule the bailee cannot set up a right of property in a third person to defeat a recovery by his bailor. But this rule is subject to many exceptions; the defendant in such suit may show that the property has been taken from him by due process of law or by a person having a paramount title. Nor are these the only exceptions. We are strongly disposed to think that the right of the true owner may be set up in all cases when upon his demand the property has in fact been delivered to him before the commencement of the suit." In *Sheridan v. New Quay Co.*, 4 Com. B., N. S., 618, the court said: "The defendants were common carriers, and therefore bound to receive the goods for carriage. They could make no inquiry as to the ownership. They have not voluntarily raised the question; it was raised by the demand of the true owner before the defendants had parted with the goods. The same would have protected them against the real owner if they had delivered the goods in pursuance of their employment without notice of his claim. It ought equally to protect them against the pseudo owner, from whom they could not refuse to receive the goods, in the present event of the real owner claiming the goods and their being given up to him." Again, in *Western Transportation Co. v. Barber*, 56 N. Y. 544-552, the court, in delivering its opinion, said: "As to the right of the bailee to deliver the property to the true owner upon demand by him, as against his bailor having no title, depending upon the mode in which the bailor obtained possession, how can this affect the question? The bailee could not set up the *ius tertii* against his bailor, however tortiously the latter may have acquired possession, unless the owner has claimed the property and the bailee has yielded to the claim. Why may he not set up the right under the same circumstances when the possession of his bailor was lawfully acquired? A bailor can confer upon his bailee no better title than he has himself, except in cases of negotiating bills of lading and like cases. If the owner demands the property of the bailee, and he refuses to deliver it to him, he is at once liable to him in an action for its conversion. This is a tort, and it would be somewhat anomalous if the bailee should shield himself from this by delivering the property to the owner; that he could not show such facts as a defense to the groundless claim of the bailor for the property. I think the best-considered cases hold that the right of a third person to which the bailee has yielded by delivering the property may be interposed in all cases as a defense to an action brought by the bailor subsequently for the property. When the owner comes and demands his property he is entitled to its immediate delivery, and it is the duty of the possessor to make it. The law will not judge the performance of this duty tortious as against a bailor having no title."

When a common carrier has received goods from a shipper from whose possession he takes them, and then delivered them to one claiming to be the true owner upon his demand, before the transportation is ended, the burden of proof is upon the carrier in an action against him by such shipper or his consignee to prove such ownership at the time of delivery, in order to excuse himself from liability: *American Express Co. v. Greenhalgh*, 80 Ill. 68. Where the bailor has no valid title, the bailee may on demand deliver the goods bailed to the rightful owner, and this would be a good defense to an action brought by the bailor, the *onus* being on the bailee to establish the defense: *Young v. East Alabama R'y Co.*, 80 Ala. 100-102. And in *Wolfe v.*

Missouri etc. R'y Co., 97 Mo. 473-480, 10 Am. St. Rep. 331, the court said: "But to justify a delivery to the true owner, contrary to or without the orders of the shipper, the carrier assumes the burden of proving the ownership at the time of such delivery, among other things it must establish the immediate right of possession in the person to whom such delivery is made."

It would seem only just and reasonable that the carrier, when a demand is made upon him for the goods by a person other than his bailor or consignee, should be allowed to hold the goods for a sufficient time to investigate in good faith and to satisfy his honest doubts as to their ownership before delivery, without making himself liable in conversion: *Rogers v. Weir*, 34 N. Y. 463-471; *Holbrook v. Wight*, 24 Wend. 169-177; 35 Am. Dec. 607; *Green v. Dunn*, 3 Camp. 215. And if he has delivered the goods to the consignee before he has knowledge that his bailor is the true owner, or before any adverse claim is set up to them, he cannot be held liable in conversion to such rightful owner: *Sheridan v. New Quay Co.*, 4 Com. B., N. S., 618. There is no doubt, except in South Carolina, that the true owner of personal property may enforce his right to it as against the consignor or consignee, or the carrier, or other bailor or bailee, whenever he sees fit to do so, before its delivery to the consignee, as directed by the bailor. Hence, when the true owner demands the property of the carrier, and the latter has notice or knowledge of the title of the former, it is the duty of the carrier to deliver the property at once to such owner, and his refusal to do so renders him guilty of a tort, and at once liable to such owner in an action for conversion: *Western Transportation Co. v. Barber*, 56 N. Y. 544-552; *Powell v. Robinson*, 76 Ala. 423; *Wells v. American Express Co.*, 55 Wis. 23; 42 Am. Rep. 695; *Pingree v. Detroit etc. R. R. Co.*, 66 Mich. 143; 11 Am. St. Rep. 479. And if, on the other hand, as we have before stated, the carrier should deliver the goods to one other than his bailor, who makes a demand upon him claiming to be the true owner, and it should afterwards transpire that the title of the bailor is paramount to that of the person claiming to be the real owner, the carrier is liable in conversion to such bailor. In cases of this character the carrier is necessarily placed in a perplexing situation, and the proper and safest course for him to pursue is thus laid down in *Hutchinson on Carriers*, section 407: "In such cases, however, if it should turn out that such claimant has not the paramount title as against the bailor, the withholding of the goods by the carrier from the latter will be treated as a conversion by him, and so when a demand is made upon him by the adverse claimant, if the carrier should refuse to surrender the goods to him he will be equally guilty of a conversion, if the title of such claimant should prove to be the better, and he, as the true owner, was really entitled to them. Where, however, the title to the property is disputed, and it becomes difficult or impossible for the carrier to determine who is entitled to them, he may be placed in a perilous position, for no matter to which he gives up the goods, whether to the bailor, or in pursuance of his directions, or to the adverse claimant, he will be in danger of being held to account for them by the other, as for a conversion, if he can show the better title. Under such circumstances, it sometimes becomes advisable for the carrier, instead of taking it upon himself to determine between the conflicting claims, to bring the parties before the proper tribunal by a bill of interpleader, in order that the parties may litigate the question of title *inter esse*, and have it there determined. He may, however, generally avoid the expense and delay of such a proceeding, by delivering the property to the party who seems best enti-

tled to it, upon being indemnified by him against loss in case it should turn out otherwise."

It may not be amiss to say here that a carrier who removes goods from the owner's place of deposit under the direction of a person in apparent control and actual custody of them, and delivers them to such person, is not liable to the true owner for their conversion in the absence of any demand by the latter: *Gurley v. Armistead*, 148 Mass. 267; 12 Am. St. Rep. 555.

Seizure under Legal Process as Excuse for Nondelivery. — A common carrier is excused from liability for not carrying and delivering goods when, without any act, fault, or connivance on his part, they are seized by virtue of legal process and taken out of his possession. This proposition is universally admitted and established, no matter by or against whom the process is sued out, provided it is valid: *Blyden v. Hudson Riv. R. R. Co.*, 36 N. Y. 403; *Savannah etc. R. R. Co. v. Wilcox*, 48 Ga. 432; *Ohio etc. R'y Co. v. Yoke*, 51 Ind. 181; 19 Am. Rep. 727; *McAlister v. Chicago etc. R. R. Co.*, 74 Mo. 351; *Pingree v. Detroit etc. R. R. Co.*, 66 Mich. 143; 11 Am. St. Rep. 479; *Burton v. Wilkinson*, 18 Vt. 186; 46 Am. Dec. 145; *French v. Star Union etc. Co.*, 134 Mass. 288; *Furman v. Chicago etc. R. R. Co.*, 57 Iowa, 42; 62 Iowa, 395; 68 Iowa, 219; *Jewett v. Olsen*, 18 Or. 419; 17 Am. St. Rep. 745; *Wells v. Main Steamship Co.*, 4 Cliff. 228; *Lemont v. New York etc. R. R. Co.*, 28 Fed. Rep. 920. In order to excuse the carrier from liability, the seizure of the goods under legal process must have been made without laches, connivance, or collusion on his part, and if the carrier, on demand of an adverse claimant to surrender possession, refuses, but promises to and does delay shipment, so as to give such claimant an opportunity to sue out legal process, under which the goods are seized, he is liable for the goods, unless he can show that such claimant is the rightful owner: *Robinson v. Memphis etc. R. R. Co.*, 16 Fed. Rep. 57.

In the absence of fraud and collusion on the part of the carrier, a seizure of goods under legal process valid on its face will protect him from liability. The foundation for this rule is found in the leading case of *Stiles v. Davis*, 1 Black, 101-106, where the court said in the course of its opinion that, "After the seizure of the goods by the sheriff under the attachment, they were in the custody of the law, and the defendants could not comply with the demand of the plaintiffs for possession without a breach of it, even admitting the goods to have been at the time in his actual possession. The case, however, shows that they were in the possession of the sheriff's officer or agent, and continued there until disposed of under the judgment upon the attachment. It is true that these goods had been delivered to the defendant as carriers by the plaintiffs, to be conveyed for them to the place of destination, and were seized under an attachment against third persons; but this circumstance did not impair the legal effect of the seizure or custody of the goods under it so as to justify the defendant in taking them out of the hands of the sheriff. The right of the sheriff to hold them was a question of law to be determined by the proper legal proceedings, and not at the will of the defendant nor that of the plaintiffs."

It is the duty of the carrier, when goods are taken from his possession by virtue of legal process, to give prompt notice to the consignor or owner of the goods of such seizure or of the institution of legal proceedings against them in order that he may have the opportunity of showing his title thereto or of protecting his interest therein, and failing to give such notice, the carrier becomes liable for the goods, or at least assumes the burden of proving that the party seizing them under legal process has the paramount title:

Robinson v. Memphis etc. R. R. Co., 16 Fed. Rep. 57; *Jewett v. Olsen*, 18 Or. 419; 17 Am. St. Rep. 745; *Bliven v. Hudson Riv. R. R. Co.*, 36 N. Y. 403; *Savannah etc. R. R. Co. v. Wilcox*, 48 Ga. 432; *Ohio etc. R'y Co. v. Yale*, 51 Ind. 181; 19 Am. Rep. 727. When goods are taken from a common carrier by an officer or under process of law, it must be made to appear, in order to excuse the carrier from liability for failure to deliver or to return the goods to the consignor, that the proceeding or process under which the seizure is made is legal and valid, and authorizes the officer to make it, for it is the rule of some cases that if the process is void for want of jurisdiction in the court to issue it, or for any other reason, it confers no authority upon the officer to make the seizure, but he becomes a mere trespasser in making it, and the carrier, who is no more obliged to submit to his acts under such process than to those of any other wrongdoer, himself becomes a wrongdoer by delivering the goods by virtue of such illegal process, and liable for their value: *Gibbons v. Farwell*, 63 Mich. 345; 6 Am. St. Rep. 301; *Kif v. Old Colony etc. R'y Co.*, 117 Mass. 591; 19 Am. Rep. 429; *Edwards v. White Line Transit Co.*, 104 Mass. 159; 6 Am. Rep. 213. The better rule would seem to be, however, that all that should be required of the carrier is to ascertain that the process is fair and valid upon its face; for if it will justify the officer in serving it, it ought certainly to justify the carrier in yielding to it: *McAlister v. Chicago etc. R. R. Co.*, 74 Mo. 351. When the carrier allows an officer to take goods from its possession without any warrant or legal process, the officer is a trespasser, and the carrier is liable for the goods in the same manner as if it had allowed any other trespasser to take the property out of its custody: *Bennett v. American Express Co.*, 83 Me. 236; 23 Am. St. Rep. 774.

MONTAGUE v. STELTS.

[87 SOUTH CAROLINA, 200.]

COLLATERAL SECURITIES — DILIGENCE REQUIRED IN COLLECTING. — When a creditor receives from his debtor notes or other securities as collateral he becomes a bailee thereof and as such he is bound to use ordinary diligence, such as persons usually exercise in reference to their own matters, in endeavoring to collect the collateral, and, for a failure to use such diligence, he is answerable for the loss resulting to his debtor.

COLLATERAL SECURITIES — DUTY OF CREDITOR — DEFENSE BY DEBTOR. — When a creditor receives from his debtor either notes or other obligations of any kind of third persons, as collateral security for the payment of his debt, he cannot, in the absence of an express agreement to the contrary, maintain his action for the recovery of his debt without accounting for the collateral by showing either that he has collected it and applied it as a credit on the debt, or that he could not by the use of due diligence collect it. In such case the debtor is not compelled to claim damages for negligent loss arising from failure to use diligence to collect by separate action or counterclaim, but may interpose it as a defense to such action and thus require an accounting for the collateral by the creditor.

ACTIONS — WHEN AND HOW COMMENCED. — An action is commenced when a summons and complaint are delivered to the sheriff with the intent that they shall be actually served upon the defendant.

MORTGAGES — ATTORNEY'S FEE ON FORECLOSURE. — When mortgage notes stipulate for the payment in the event of suit, of attorney's fees of ten per cent of the amount due at time of suit, and a bond given at the same time stipulates for the payment of such notes according to their "tenor, true intent, and meaning," while the mortgage given to secure the payment of the notes and bond covenants "to pay all attorneys' fees and commissions at the rate of ten per cent on the amount for which foreclosure may be had," the mortgagor is liable for ten per cent of the amount due when the foreclosure suit is commenced, although foreclosure is ordered for a less amount by reason of payments having been made.

MORTGAGES — APPLICATION OF PAYMENTS. — A creditor holding a mortgage on property to secure the payment of his debt, is bound to apply the proceeds of a sale of the mortgaged property to the mortgage debt without any direction to that effect from the debtor.

MORTGAGES — APPLICATION OF PAYMENTS TO UNSECURED NOTE. — When a mortgage does not cover the rents and profits of the land embraced in the mortgage and such rents and profits are assigned to the mortgagee, he may apply them in payment of an unsecured note held by him against the mortgagor in the absence of any direction from the latter as to the application of such payments.

ACTION to foreclose a mortgage. Both parties excepted to the report filed by the master. The exceptions were overruled by the court and the report was confirmed. Plaintiff appealed alleging error as follows: "1. In overruling plaintiffs' exceptions to the report of the master, which were as follows: 'In holding that plaintiffs did not use due diligence for the collection of the balance of two hundred fifty-one dollars and twenty cents on said collaterals. That plaintiffs are liable to the defendant, Mrs. Stelts, for the sum of two hundred fifty-one dollars and twenty cents, which they failed to collect on said rent contracts from want of due diligence. Said sum has been allowed as a credit in the ascertainment of the amount due on the mortgage debt of plaintiffs.' 2. Because the presiding judge erred in holding under the pleadings and testimony in this case that the plaintiffs had not exercised sufficient diligence in the collection of the collateral securities, and that they should be charged with the amount uncollected, namely, two hundred fifty-one dollars and twenty cents; a. Such negligence not having been set up either by way of defense or by counterclaim for damages; b. There being no evidence that the negligence of plaintiffs has caused a loss of the securities." The defendant also appealed, alleging error as follows: "1. Because his honor erred in overruling the following exceptions filed by the said defendant Ina H. Stelts, to the master's report; 3. Because the master erred

in his construction of the agreement for compromise set forth in the evidence, in that he held that the defendant, Ina H. Stelts, was liable for anything under her mortgage, except the nine hundred twenty-five dollars mentioned therein; 7. Because the master having found as a matter of fact that the notes in suit provided for ten per cent attorneys' fees upon the amount due at the time suit was commenced, it was error in him to hold that the plaintiffs were entitled to recover attorneys' fees upon any amounts except the amount due at the time the summons was served on Mrs. Stelts on the — day of June, 1891; 8. Because the time of the commencement of a suit is the time of the service of summons upon the defendant, and the plaintiffs had no right, under the terms of the notes, to recover anything for attorneys' fees, except ten per cent upon the amount due on the notes by the defendant, Ina H. Stelts, at the time the summons was served upon her; 13. Because, even according to the view of this case taken by the master, that Mrs. Stelts understood that the payment of the nine hundred twenty-five dollars was to stand another year, and that the plaintiffs understood that the suit for foreclosure was to stand as it was for another year, the master should have held that all sums realized from these rent liens by the plaintiffs, to wit, nine hundred fifty-one dollars, should have been applied to the payment of the amount due upon the mortgage debt; 15. Because, the evidence being that all the money paid to plaintiffs by Mrs. Stelts, to wit, nine hundred fifty-one dollars, was the proceeds of rent liens upon crops raised on the mortgaged premises, it was error in the master not to hold that the plaintiffs were bound to apply the proceeds thereof to the payment of the mortgage debt; 16. Because the master erred in finding, as matter of fact, that the rent contracts became collateral security in the hand of plaintiffs, when he should have held that they operated as payment of all debts due by the defendants to plaintiffs. 2. Because the mortgage on which the action was brought expressly provides that the said defendant shall pay attorneys' fees and commissions at the rate of ten per cent on the amount for which foreclosure may be had, and it was error in his honor to allow more than ten per cent for the amount for which he granted foreclosure, to wit, the sum of five hundred fifty-one dollars and twenty-two cents." The other facts are stated in the opinion.

Perrin and Cothran, for the plaintiffs, appellant.

Graydon and Graydon, for the defendant, also appellant.

McIVER, C. J. The plaintiffs brought this suit to foreclose a mortgage of real estate given by the defendant, Ina H. Stelts, to secure the payment of two notes, and as a second cause of action, set out another note not embraced in the mortgage, and claimed judgment for the balance due thereon. The defendant, Dorcas W. Henry, who, as the holder of a senior mortgage on the same land, was made a party, whose rights do not appear to be contested, and the defendant Holcomb, who also signed the notes, made no answer; but the defendant Ina answered, claiming that the said notes had been satisfied in full by compromise with plaintiffs, the details of which are set out in her answer. The testimony tends to show that the notes sued on each contain the following stipulation: "And in the event of suit, I agree to pay attorneys' fees to the extent of ten per cent of amount due at time of suit." It seems that on the same day the two first notes were executed, the defendant Ina executed her bond to plaintiffs, conditioned for the payment of the notes, "according to the tenor, true intent, and meaning of" said notes, which bond was secured by the mortgage sought to be foreclosed, in which the stipulation as to attorneys' fees is expressed as follows: "But should the said C. L. Montague & Co., their heirs or assigns, prefer to foreclose this mortgage by due course of law, I, the said Ina H. Martin [Stelts], agree to pay all attorneys' fees and commissions at the rate of ten per cent on the amount for which such foreclosure may be had."

Some time in November or December, 1888, these papers were sent by plaintiffs to Messrs. Perrin and Cothran, attorneys at law, for collection, who, by the authority of the plaintiffs, entered into a written agreement with the defendants, Ina H. Stelts and Holcomb, for a settlement of these notes, as well as certain open accounts, a copy of which is set out in the "case," which agreement bears date 16th of February, 1889. By the terms of this agreement, the said defendants were to pay the sum of three hundred twenty-five dollars in cash, which was to be applied first to the open accounts, and the balance to the note above mentioned, as not included in the mortgage; and this amount was paid and applied accordingly, leaving a balance due on said note; and as a full set-

tlement of the said balance, as well as of the notes secured by the mortgage, the said defendants were to pay to plaintiffs on the 1st of December, 1889, the sum of nine hundred twenty-five dollars, and if the same is not paid when due, the plaintiffs "shall have the right to collect all that may be due them by and under the said notes and accounts, irrespective of this agreement, except as to application of payment of three hundred twenty-five dollars." And the said defendant Ina "agrees that the mortgage heretofore given to secure the two first notes above referred to shall not in anywise be affected by this agreement, but that the same shall continue of force as security for the payment of said nine hundred twenty-five dollars, as aforesaid, and for the payment of the whole amount due, in case said sum in compromise is not paid when due."

This amount not having been paid when due, the plaintiffs commenced this action by lodging the summons and complaint, with copies thereof, with the sheriff, for service, on the 19th of December, 1889, upon which "the sheriff made return of service upon the defendants, Ina H. Stelts and John H. Holcomb, as of date December 20, 1889," the other defendant being served some time in the same month. On the 29th of May, 1891, the defendant Ina served a notice of a motion for leave to answer, alleging that she had never been served. This motion having been granted, she was served on the 8th of June, 1891, and filed her answer on the 15th of that month. After the suit had thus been commenced, further negotiations were had between the parties, which resulted in a verbal agreement as to the terms of which there is some apparent conflict in the testimony. The arrangement, as understood by the plaintiffs, was that if the defendants would turn over to plaintiffs certain obligations for the rent of the mortgaged premises for the year 1890, amounting to nine hundred fifty-one dollars and twenty cents, the matter should stand as it was, and no further steps taken in the suit until sale day in December, 1890, while the defendant seems to have understood that these obligations for rent would be accepted by plaintiffs in full satisfaction of the nine hundred twenty-five dollars agreed to be paid by the compromise in writing hereinbefore referred to, of date the 16th of February, 1889.

These rent contracts, as they are called, were turned over to the attorneys for plaintiffs, who collected upon them the sum of seven hundred dollars, and applied the same first to

the balance due upon the unsecured note, and next to the first note secured by the mortgage, leaving a balance due on that note, as well as the whole amount of the second note secured by the mortgage. The master seems to have adopted the view contended for by plaintiffs, and finding that the rent contracts were delivered to the plaintiffs as collateral security for the debt due them by defendants, held that they were bound to use due diligence in collecting the amounts due on the rent contracts, and not having done so, defendants were entitled to a credit for the amount not collected, viz., two hundred fifty one dollars and twenty cents. He also held that the plaintiffs were entitled to ten per cent commissions on the amount due at the time of the commencement of this action, which he seems to have fixed as the 19th of December, 1889, and making the calculation upon this basis, he found that the plaintiffs were entitled to judgment of foreclosure for six hundred seventy-five dollars and eighteen cents, and to a personal judgment for thirteen dollars and twenty-three cents.

To this report, both plaintiffs and the defendant, Ina H. Stelts, excepted, upon the grounds set out in the "case," and the case coming before his honor, Judge Hudson, he rendered judgment, overruling all of the exceptions and confirming the report of the master. From this judgment both parties appeal upon the several grounds set out in the record.

We will first consider the questions raised by the plaintiffs' exceptions. First, was there any error in finding as matter of fact that the plaintiffs had failed to use due diligence in collecting the amount due on the rent contracts lodged with them as collaterals. So far as this presents a question of fact, we could not, under the well-settled rule, disturb the conclusion reached by the concurring judgment of the master and the circuit judge, where there is, as we think there is, testimony sustaining such conclusion. Mr. Cothran, with commendable candor, says: "I did n't make all the effort to collect it that I would have made if it had been my own matter"; though it is due to that gentleman to add that, according to his view, it was not his duty to do so, and that it was more the duty of defendants, who were most interested, to press the collection. This, we think, was a mistaken view. When a creditor receives from his debtor notes or other securities as collaterals, he becomes a bailee of such securities, and as such he is bound to use ordinary diligence, such as persons

usually exercise in reference to their own matters, in endeavoring to collect such securities, unless there is an express agreement relieving him of such obligation; and here there is no evidence of any such agreement: See 18 Am. & Eng. Ency. of Law, 643.

It is contended, however, by plaintiffs, that the alleged negligence of the plaintiffs in not collecting the whole amount due upon the rent contracts, not being set up in the answer, either by way of defense or by way of counterclaim for damages, there was error in charging the plaintiffs with the amount uncollected. The assumption that the failure to use due diligence in collecting these rents is not set up by way of defense, is not well founded, as it is expressly alleged in the fifth paragraph of the complaint that the plaintiffs could have collected the whole amount due on the rent contracts if they had used due diligence. The main point of the objection, however, seems to be that negligence should have been set up either by way of a separate defense to the action or by a counterclaim for damages resulting from plaintiffs' negligence. It seems to us, however, that the true rule is, that where the creditor receives from his debtor either notes or obligations of any kind of third persons, as collateral security for the payment of his debt, he cannot, in the absence of an express agreement to the contrary, maintain his action for the recovery of his debt without accounting for the collaterals by showing either that he has collected them, and applied them as credits on the debt, or that he could not, by the use of due diligence, collect them. We do not think there was any error, therefore, in charging the plaintiffs with so much of the collaterals as they failed to collect by reason of their failure to exercise due diligence; there being no evidence that they could not be collected by the use of due diligence.

We come, then, to the questions presented by the defendants' exceptions. So far as these exceptions present questions of fact, we think they are concluded by the concurrent findings of the master and the circuit judge; for there certainly was testimony to support such findings, and we think, ample for that purpose.

As to the question, when the action was commenced, we think it is conclusively determined by the express terms of section 120 of the Code, which declares that an attempt to commence an action by delivering the summons to the sheriff, with the intent that it shall be actually served, is deemed

equivalent to the commencement of an action: See also *Curtion v. Dargan*, 12 S. C. 122. Here, the undisputed fact is, that the summons and complaint were delivered to the sheriff on the 19th of December, 1889, and there can be no doubt that this was done with the intent that these papers should be actually served, for the sheriff proceeded to make the service, and made return thereof on the next day, and the plaintiffs proceeded under the belief that all the parties had been actually served. There is no doubt, therefore, that the action was then commenced.

The next inquiry is, whether there was error in charging the ten per cent commissions on the amount due when the action was thus commenced. If we look alone to the terms of the notes, there can be no doubt that the plaintiffs were entitled to the ten per cent on the amount due at the time of the commencement of the action, for that is in accordance with the express stipulation contained in the notes. But it is contended that, inasmuch as the mortgage contained a somewhat different stipulation as to the ten per cent commissions that should govern, and the ten per cent could be charged only on the amount for which judgment of foreclosure was had, which was less than the amount due when the action was commenced, by reason of the fact that certain payments were made after the action was commenced, and before the judgment of foreclosure was obtained, from the collections made on the rent contracts. It will be remembered, however, that the notes constituted the evidence of the debt, and the mortgage was a mere accessory, designed to secure the payment of what was really due on the notes; and to them, therefore, must we look to ascertain the amount due. In addition to this, it will be observed that the bond which the mortgage was given to secure was conditioned for the payment of the notes, "according to the tenor, true intent, and meaning of" the said notes. So that, we think, there was no error in computing the ten per cent commissions on "the amount due at the time of suit."

The only remaining inquiry is, whether there was error in holding that the plaintiffs had the right to apply the proceeds of the rent liens to the unsecured note. While it is quite true that the rule is, that where a creditor holding a mortgage on property, to secure the payment of his debt, is bound to apply the proceeds of the sale of the mortgaged property to the mortgage debt, without any directions to that effect from his

debtor, as was held in *Thatcher v. Massey*, 20 S. C. 542, and *Ellis v. Mason*, 82 S. C. 280, yet here it was not made to appear that the money applied to the unsecured note was derived from the sale of the mortgaged property; nor does it appear that the mortgage covered the rents and profits of the land embraced in the mortgage. We do not think, therefore, that any error has been shown in regard to the application of the money derived from the rent contracts.

The judgment of this court is, that the judgment of the circuit court be affirmed.

COLLATERAL SECURITY — DILIGENCE IN COLLECTING. — A pledgee of non-negotiable choses in action is required to exercise reasonable care and diligence in their collection: *Rumsey v. Laidley*, 34 W. Va. 721; 26 Am. St. Rep. 935, and note; *Roberts v. Thompson*, 14 Ohio St. 1; 82 Am. Dec. 465, and note; *Bridge Co. v. Savings Bank*, 46 Ohio St. 224. Generally the pledgee of negotiable securities as collateral security for a debt has no right, in the absence of a special agreement, to accept less than the amount due on the collateral in payment thereof, and if he does so he will be liable to the pledgor for the amount of the loss: *Folls v. Hardin*, 139 Ill. 405. See also extended note to *Miller v. Gettysburg Bank*, 34 Am. Dec. 451.

COLLATERAL SECURITY — NECESSITY TO REALIZE UPON. — One holding collateral securities is not required to realize upon them before bringing an action to recover judgment upon the debt secured: *De Cordova v. Barnum*, 180 N. Y. 615; 27 Am. St. Rep. 538, and note with cases collected; and see note to *Miller v. Gettysburg Bank* 34 Am. Dec. 538.

ACTIONS, WHEN AND HOW COMMENCED. — Actions are considered as "sued and commenced," within the meaning of the statute of limitations, when the writ is sued out and delivered to the sheriff, or sent to him with the *bona fide* intention of having the same served: *Johnson v. Farwell*, 7 Greenl. 370; 22 Am. Dec. 203, and note; *Cross v. Barber*, 16 R. I. 266. An action is instituted by the service of the writ: *Perkins v. Perkins*, 7 Conn. 558; 18 Am. Dec. 120. The issuing of the summons is the commencement of the action: *Fleming v. Patterson*, 99 N. C. 404. This question is fully discussed in the extended note to *Ross v. Luther*, 15 Am. Dec. 344.

MORTGAGES — APPLICATION OF PROCEEDS OF SALE ON MORTGAGE. — A mortgagee, receiving money from the sale of property covered by the mortgage, is bound to apply it to the extinguishment of the mortgage: *Webster v. Singley*, 53 Ala. 208; 25 Am. Rep. 609; *Tennant v. Stoncy*, 1 Rich. Eq. 222; 44 Am. Dec. 218; *Andrews v. O'Mahoney*, 112 N. Y. 567.

DUKES v. FAULK.

[37 SOUTH CAROLINA, 265.]

ESTATES — DEFINITION OF THE WORD "HEIRS." — Heirs are the persons in whom real estate vests by operation of law, on the death of the one who was last seised. Ordinarily, the statute of distributions designates who are entitled to the character of heirs, as well as the shares to be enjoyed by them.

ESTATES — LIMITATIONS ON. — "HEIRS AT LAW," "LEGAL HEIRS," "HEIRS OF BODY," or kindred terms, used in a grant or devise betokening a grant, gift, or devise, to such as a class, to take effect at a particular time, entitle such parties to take as purchasers, and not by descent, especially if the estate is made absolute by additional words of inheritance. In such case, the distribution will be *per stirpes*, unless the grant or devise otherwise directs.

ESTATES — MODE OF DISTRIBUTION. — Whenever, by the terms of description in a grant or devise, resort must be had to the statute of distributions for the purpose of ascertaining the objects of the gift, resort must also be had to the statute to ascertain the proportions in which the donees shall take, unless the instrument making the gift indicates the intention of the donor that a different rule of distribution shall be pursued.

ESTATES — LIMITATIONS — HEIRS, WHEN TAKE PER CAPITA. — When the words "heirs of the body" occur in a grant or devise accompanied by the words "share and share alike," or kindred words, accompanied by words of inheritance, the statute of distributions determines the parties who are to take, but the method of distribution is fixed by the devise to be *per capita* and not *per stirpes*, and the estate is one of purchase, and not of descent. The persons taking must not only answer the requirements of lineal descendants of the parent stock, but must also be such as would stand at the death of the life tenant as an heir under the statute of distributions.

ESTATES — LIMITATIONS — HEIRS, WHEN TAKE PER CAPITA. — When a devise is made to a daughter for life, and at her death to the heirs of her body then living, share and share alike, accompanied by words of inheritance, upon the death of the life tenant distribution will be made only to the surviving heirs of her body then living, namely, her children, to the exclusion of their issue, and such of her living grand and great-grand children as have survived their ancestors, and those who take will take *per capita* in fee, and not *per stirpes*.

WILLS — CONSTRUCTION — LIMITATION OF ESTATE. — When a clause in a will contains a limitation on a devise under a certain contingency, and such contingency never has nor never can occur, the clause has no controlling influence in the construction to be put upon the remainder of the will.

ACTION between Oscar F. Dukes and others against John Faulk and others, involving the distribution of an estate. Judgment in favor of said Faulk and others, and Dukes and others appealed.

W. M. Thomas, for the Thomas minors, appellants.

Rutledge and Rutledge, for the Dukes minors, appellants.

W. H. Thomas and A. J. Simons, for the appellees.

POPE, J. This action came on to be heard by his honor, Judge Witherspoon, at the fall term, 1891, of the court of common pleas for Charleston County, and on the fourth day of January he filed his decree. From this decree an appeal has been taken by two sets of defendants, viz., the Thomas minors and the Dukes minors. There is no question of fact involved. The appeal relates solely to questions of law which grow out of the following provision of the last will and testament of Mrs. Dorcas Elmore, of the city of Charleston, in this state, who died on the 10th of January, 1827, to wit: A house and lot, "for the sole, separate, and exclusive use, etc., of my step-daughter (daughter-in-law) Emelia and my son Stent, during their natural lives, and to be in no wise subject to his debts, control, or intermeddling whatever, and after the death of my said step-daughter (daughter-in-law) and my son Stent, it is my will that it shall descend to such heirs as my said step-daughter (daughter-in-law) Emelia and my son Stent shall have living at the time of their death, begotten by them, share and share alike, to them, their heirs, executors, administrators, and assigns, forever. And in the event of there being but one, then, and in such case, he or she shall be entitled to such share as his, her, or their ancestors would have been entitled if then living; and should my said step-daughter (daughter-in-law) Emelia leave no heirs, begotten by my said son Stent, capable of inheriting, then it is my will that the said property shall descend to my daughter Ann Eliza, wife of A. Gilliland," etc.

A brief reference to the facts may not be amiss just here. Stent Elmore died many years ago. Emelia, his wife, lived until the 17th of September, 1889. The children born to Stent and Emelia were three: James W. Elmore, Pamela E. Elmore, and Mary Ann Elmore, all of whom died during the lifetime of the surviving life tenant, Emelia Elmore. James W. Elmore died in 1856 or 1857, unmarried, and without issue. Pamela Elmore, having intermarried with one Thomas Alexander, died the 28th of April, 1872, leaving two children, both of whom survived the life tenant, one of whom, Florence Faulk, has died, leaving a husband and five children. Mary Ann Elmore, who had married one Dukes, died the 17th of July,

1888, leaving children and grandchildren. The names of all these parties are set forth carefully in the "case," and it will be unnecessary to state them again, especially as the master's report and the decree of the circuit judge must be printed. All the children being dead, and there being children and grandchildren of such children of Emelia and Stent Elmore alive at the death of the surviving life tenant, this contest has arisen as to the distribution of the proceeds to arise from the sale of the house and lot in question.

Three views have been presented to this court for its consideration: 1. That the proceeds of sale shall be so divided as that the children and grandchildren of Mrs. Mary Ann Dukes shall receive one half thereof, and the other half to be divided among the children and grandchildren of Mrs. Pamela Alexander *per stirpes*; 2. That such proceeds shall be divided amongst the ten parties who stood, on the death of the life tenant, as heirs of her body, under the laws of this state, *per capita*; 3. That such proceeds shall be divided among all the grandchildren and great grandchildren of the life tenant, *per capita*.

We will first consider the general principles of our laws pertaining to an estate, provided for such persons as shall, at a particular time named by the testator, sustain a particular character. Then we will briefly notice the particular circumstances that are alleged to control the distribution here.

1. Our act of 1791 wrought a great change in the laws of inheritance that formerly prevailed here on the same subject, and derived from the mother country, and it was to be expected that the definition of the term "heirs" should be thereby changed. Accordingly, we find, in the decisions of our courts, that "heirs" came to mean such persons in whom real estate vests by operation of law, on the death of one who was last seised: *Seabrook v. Seabrook*, McMull. Ch. 206, 207; *Templeton v. Walker*, 3 Rich. Eq. 550; 55 Am. Dec. 646. It was stated in the case first quoted: "The court is unable to find any better definition of an 'heir' than the person in whom real estate vests by operation of law on the death of one who was last seised. This law varies in different countries, in the same country at different periods, and in the same country in relation to different estates. By the common law, the father or grandfather would be excluded. In England, the estate in general descends to the eldest son, to the exclusion of daughters and other sons. By the laws of

South Carolina, a more equitable distribution, both of real and personal estate, is provided. In order to ascertain who is the heir, it is necessary only to inquire to whom, by the law of the land, would the estate pass in case of intestacy." In the second case cited this language occurs: "The term 'heirs' is inapplicable to the succession in personal estate; and even as to real estate, we have no other heirs except the *hæredes facti* of our statute of distributions. So that ordinarily we must look to the statute of distributions to ascertain the persons who are entitled to the character of heirs, as well as the shares to be enjoyed by them.

When in a grant or devise words are used such as "heirs at law," "legal heirs," "heirs of the body," or kindred phrases or terms, betokening a grant, or gift, or devise to such as a class, to take effect at a particular time, such parties took as purchasers, and not by descent, especially if the estate to be vested was made absolute by the additional words, "their heirs and assigns forever." More frequently the question raised in connection with such words has been the method of distribution of the estate so vested among the individuals or members of the class, and for awhile in this state this doctrine was unsettled. In *Campbell v. Wiggins*, Rice Eq. 10, it was held to be a division *per capita*. However, this view, though much shaken, still prevailed in *Lemacks v. Glover*, 1 Rich. Eq. 141. But at length, in the case of *Templeton v. Walker*, 3 Rich. Eq. 550, 55 Am. Dec. 646, decided in 1850 by the court of errors, it was held that where no words were used in the grant or devise providing for a different distribution, the rule as laid down in our statute of distributions in cases of intestacy should not only determine the persons composing the class, but should also fix the share of each. In the words of that decision: "We are justified in establishing as a general rule, in cases like the one before us, that the partition shall be *per stirpes*." And so the law remains until this day.

It will be observed that such last-announced rule only applies to those cases where the grantor or deviser has not indicated a different mode of partition; it is always admitted that such grantor or deviser has a perfect right in the instrument that announces his determination on this point to fix the shares of each one of a class, provided, always, the same is not in conflict with the law of the land. Chief Justice McIver, in announcing the judgment of this court in the case of

Allen v. Allen, 13 S. C. 512, 36 Am. Rep. 716, says: "If therefore, the gift is to a class of persons designated as heirs of a particular person, then, as it is necessary to resort to the statute to ascertain who are the individuals composing the class, resort must also be had to the statute to determine how or in what proportions such individuals shall take. This is upon the presumption that the donor, having by implication, at least, referred to the statute as to the persons who are to take, also intended that reference should be had to the statute to determine the proportions in which they should take, *unless he expresses a different intention. But when he prescribes a different mode of distribution, then no such presumption can arise, and the distribution must be made in the manner prescribed.*" (Italics ours.) And so, too, in the case of *Kerngood v. Davis*, 21 S. C. 183, where Mr. Justice McGowan delivers the judgment of the court, this language is used (page 207): "In such cases, after much discussion and some difference of opinion, it seems to have been settled as a rule of construction that 'wherever by the terms of description in a devise or grant resort must be had to the statute of distributions for the purpose of ascertaining the objects of the gift, resort must also be had to the statute to ascertain the proportions in which the donees shall take, unless the instrument making the gift indicates the intention of the donor that a different rule of distribution shall be pursued': *Campbell v. Wiggins*, Rice Eq. 10; *Lemacks v. Glover*, 1 Rich. Eq. 141; *Rochell v. Tompkins*, 1 Strob. Eq. 114; *Collier v. Collier*, 8 Rich. Eq. 555; 55 Am. Dec. 653."

We think we may now announce as the law of this commonwealth that when the words "heirs of the body" occur in a devise, accompanied by the words "share and share alike," or "equally," or "in equal parts," or kindred words, and also the words "their heirs, executors, administrators, and assigns," that we must look to the statute of distributions of our state for the parties who shall answer the description, and therefore take the devise, but that the method of distribution is fixed by the devise itself to be *per capita*, and not *per stirpes*, and that the estate is one of purchase and not of descent. It seems to us that the "heirs of the body" must be persons not only who answer the requirement of lineal descendants of the parent stock, but also such persons who would stand at the date of the death of life tenant as an heir under the provisions of our statute of distributions. In

Templeton v. Walker, 3 Rich. Eq. 550, 55 Am. Dec. 646, it is said: "No one can take as heir of the body of another unless he fulfill the description, and is not only such person as would take the real estate of that other under our act of distributions, but, likewise, a lineal descendant." In *Lemacks v. Glover*, 1 Rich. Eq. 141, it is said: "In *Campbell v. Wiggins*, Rice Eq. 10, the legislature has made a grant to the heirs at law of Blake Baker Wiggins, deceased, and it was held that the grandchildren as well as the children were entitled. In this case the description is restricted to 'heirs of the body.' This includes all the lineal descendants of Mrs. Jane Glover, who were also at the time of her death her 'heirs,' according to the laws of the state; and, it may be added, it includes only such lineal descendants who are also heirs. In the language of *Matthews v. Paul*, 8 Swanst. 339, the rule must be the same both as to persons excluded as well as those included. They must answer the entire description at the period fixed."

To illustrate our meaning by stating the facts in the last-quoted case: The will of Peter Sinkler gave the use of certain property to his sister, Jane Glover, for life; Mrs. Glover, at the time of her death, had but one child, Dr. Glover; testator, after the death of the life tenant (Mrs. Glover), bequeathed such property "to the heirs of her body, to them and their heirs and assigns, forever." Mrs. Glover died fifty-one years after her brother's death. She had four other children born to her, all of whom, but one (Mrs. Lemacks), died before Mrs. Glover, the life tenant, and all were survived by children. The question was made as to the distribution. It was held, that Dr. Glover took one share, Mrs. Lemacks one share, and each grandchild who was the child of a deceased child, took one share each. Both Mrs. Lemacks and Dr. Glover had children, but they were denied participation in the estate. Why? Because, at the death of Mrs. Glover, the life tenant, although her lineal descendants, they were not her heirs, under our statute of distributions; their respective parents, Dr. Glover and Mrs. Lemacks, were alive, and were such heirs.

Furthermore, in construing such a devise as that under consideration, relation must be had to the circumstances that attend the event of the falling in of the life estate, rather than those that attended the death of the testator. There is no reason in our law to favor such devise being intended for children, to the exclusion of, or preference to, other lineal

descendants. If the testator desired such result, apt words therefor should have been used. The words of this devise plainly import, that those lineal descendants who should survive the life tenants should take; survivorship was an element in the power to take. No estate was provided for those who did not so survive the life tenant. The estates provided were contingent remainders, not vested, and it is felt that there is no need to elaborate these propositions, since the decisions of this court, in the cases of *Dickson v. Dickson*, 28 S. C. 216, and *Roundtree v. Roundtree*, 26 S. C. 450.

2. Having disposed of the questions suggested by the appeal here, so far as the same are of a general character, it will be necessary to refer to so much of the circuit decree as seeks to give some controlling influence to the last clause, "and in the event of there being but one, then, and in such case, he or she shall be entitled to such share as his, her, or their ancestors would have been entitled to, if living." As remarked at the bar, no such contingency as contemplated by this language has occurred, whether you make it read, child of Emelia, or child of a child, or child of a child's child. The testatrix could not have meant Emelia's child, for, in that event, there could have been no ancestor who took a share, for certainly Stent and Emelia took nothing that passed to the "heirs of their bodies" through them. And, if it meant grandchild, it would be just as ineffective, for it was only in the event, there was only one such that anything like a *per stirpes* distribution was contemplated. The result of our careful attention to these matters is, that we conclude, that the following lineal descendants of Emelia and Stent Elmore alone take, and that, too, *per capita*, that is to say: Mrs. Faulk, Henry Alexander, Oscar F. Dukes, Elmore Dukes, Teressa G. Dukes, James W. Thomas, Ancrum O. Thomas, George V. Thomas, Leo D. Thomas, and Elmore S. Thomas, the share (one tenth) of Mrs. Faulk being divisible amongst her husband and five children, according to our statute of distribution.

It follows, therefore, that it is the judgment of this court, that the judgment of the circuit court be reversed, and the cause be remanded to the circuit court, to carry into effect the principles herein announced.

DESCENT — DEFINITION OF WORD "HEIRS." — "An heir is he upon whom the law casts the estate immediately upon the death of his ancestor, and the estate so descended on an heir, is in law called the inheritance": See monographic note to *In re Ingram*, 12 Am. St. Rep. 82.

ESTATE. — HEIRS, WHEN TAKE PER CAPITA, WHEN PER STIRPES: See extended note to *In re Ingram*, 12 Am. St. Rep. 112. When the distributees of the personal estates of the intestate stand in unequal degrees of relation to the deceased, they take *per stirpes*: *Preston v. Cole*, 64 N. H. 450; *Kilgore v. Kilgore*, 127 Ind. 276; *Garrett v. Bean*, 51 Ark. 52. The nearest descendants or issue in equal degree of kindred to the intestate are to take *per capita*, and those in more remote degree *per stirpes*: *Balch v. Stone*, 149 Mass. 39.

SHELLEY'S CASE. — A full discussion of the rule in this case is given in the monographic note to *Carpenter v. Van Olinder*, 11 Am. St. Rep. 100.

CROCKER v. COLLINS.

[37 SOUTH CAROLINA, 327.]

PLEADING — INACCURACY OF NAME NOT GROUND FOR DEMURRER. — The fact that the name of the defendant, a municipal corporation, is not accurately stated in the complaint is not ground for demurrer.

PLEADING — SUFFICIENCY OF COMPLAINT — DEMURRER. — When the allegations contained in a complaint against a municipal corporation are sufficient to show that the acts complained of were done by the executive officer of the town council, under authority of that body, any want of particularity or distinctness in the allegation in this respect should be remedied by motion to make the allegations more definite, but it is not a ground for demurrer.

PLEADING — DEMURRER — WHEN QUESTION OF TITLE TO STREET BY ADVERSE POSSESSION CANNOT BE RAISED BY. — When a complaint in an action against a municipal corporation contains no allegation that the land in dispute, claimed by adverse possession, has ever been in fact a public street or alley, the question whether or not title to a public street or alley can be acquired against a city cannot be raised by demurrer.

MUNICIPAL CORPORATIONS — TITLE TO STREET BY ADVERSE POSSESSION. — A municipal corporation has no power to sell or convey its streets or alleys. Hence no title can be acquired by a private individual to a public street or alley in a city by adverse possession.

MUNICIPAL CORPORATIONS — ADVERSE POSSESSION OF STREETS — ESTOPPEL. Mere adverse possession of a public street or alley in a city for the statutory period cannot confer title, but when such possession is accompanied with other circumstances, which would render it inequitable that the public should assert its rights to regain possession, then, upon the principle of estoppel, a party may be protected against the assertion of such rights, in order to prevent manifest wrong and injustice.

MUNICIPAL CORPORATIONS — TITLE TO STREETS ARISING FROM NONUSER. — Mere nonuser of a street or alley in a city for the period of twenty years does not amount to such an abandonment as will destroy the rights of the public therein, and confer title upon a private party.

W. J. Verdier, for the appellant.

Elliott and Townsend, for the appellee.

McIVER, C. J. This action was brought for the purpose of enjoining the defendants from entering upon certain premises

in the town of Beaufort, claimed by the plaintiff, and from pulling down, destroying, or otherwise injuring the buildings standing on said premises. By consent, the testimony was taken by a special master and reported to the court, and the case came on for hearing before his honor, Judge Norton. After the pleadings were read, the defendants interposed an oral demurrer, upon the ground that the facts stated in the complaint were not sufficient to constitute a cause of action. The demurrer was overruled, and the defendants excepted, giving oral notice of appeal. Thereupon the circuit judge stated that defendants were entitled to a stay, but the defendants, waiving this right, consented to proceed, and the case was heard upon the merits. Subsequently the judge rendered his decree, granting a perpetual injunction as prayed for, and defendants appealed as well from the order overruling their demurrer as from the final judgment granting the injunction.

To determine the question as to the demurrer, it will be necessary to consider the allegations of the complaint, which are substantially as follows: The plaintiff, complaining of the defendants above named, a municipal corporation created by the laws of this state, alleges:—

1. That on the first day of January, 1880, and for many years prior thereto, Martha A. Barnwell was seised and possessed of “all that certain lot or lots of land, situate in the town of Beaufort,” etc., “and continued in adverse, quiet, and peaceable possession of the same” until the 4th of August, 1890, when she sold and conveyed the said premises to the plaintiff, who has been ever since seised and possessed of the same.

2. That plaintiff and his grantors have been in adverse possession of said premises prior to and ever since the year 1867, the same having been inclosed by a fence during all that time; and during all that time no street or alleyway has been used or opened through said premises.

3. That on the 1st of October, A. D. 1890, the defendant Collins was intendant, and the defendant Christensen and others (naming them) were wardens, and as such the said intendant and wardens constituted, and still are, the “Town Council of Beaufort.”

4. That on the 18th of October, 1890, the plaintiff was erecting a dwelling house and other structures upon said premises, which work and the materials used cost him one hundred and fifty dollars.

5. That on or about the 18th of October, 1890, John Green was marshal of the town of Beaufort, the agent and employee of the defendants, and as such did on that day, at the direction, and in accordance with the instructions, given to him by the defendants, enter upon said premises, and ordered the workmen employed by plaintiff in erecting said building to discontinue their work, and threatened to arrest them if they should proceed.

6. That on the 28th of October, 1890, the said Collins, as intendant, informed plaintiff that he objected to the erection of said buildings, because he claimed the same to be on an alley, which was the property of the town of Beaufort, and threatened to enter upon said premises and pull down and remove said buildings, under and by virtue of the powers conferred upon the defendants in relation to streets.

7. That if said threats are carried out, the damage to plaintiff will be irreparable—that a number of suits would be necessary to recover damages sustained by him.

Wherefore, an injunction is demanded, restraining defendants from pulling down and removing said buildings, and from committing any other trespass upon the said premises.

The first ground upon which the demurrer was rested is that it does not state the name of the municipal corporation of which the defendants are alleged to be officers. We do not think there is anything in this purely technical objection: *Neely v. Yorkville*, 10 S. C. 141. If there was any error in fact in stating the correct name of the municipal corporation, such error would not constitute any ground for demurrer, but should be corrected by some other mode of proceeding.

The next ground upon which the demurrer is rested seems to be that there is no sufficient allegation that the acts complained of were done or threatened by any officer of the municipal corporation. We do not think this ground can be sustained; for it seems to us that the allegations contained in the complaint, if true, are sufficient to show that the acts complained of were done by the executive officer of the town council under the authority of that body, and if there is any want of particularity or distinctness in the statements found in the complaint, that should be remedied by a motion to make the allegations more definite and distinct, and not by a demurrer.

The next ground relied upon to sustain the demurrer is that the plaintiff's claim of title rests only upon adverse possession,

and this cannot confer title as against the public, represented by the municipal corporation of which defendants are the officers. If the complaint had set forth the fact that the premises in question originally constituted one of the public streets or alleys of the town of Beaufort, to which the plaintiff had acquired a title by adverse possession, then it would be necessary for us to decide, under the demurrer, the very grave and important question, whether title can be acquired by a citizen against the public by adverse possession. But it will be observed that there is no such allegation in the complaint. It does not appear from anything there stated that the parcel of land, which is in question, ever was either a street or alley of the said town. The most that does appear is that one of the defendants, as intendant, "informed plaintiff that he objected to the erection of said buildings, because he claimed them to be on an alley, which was the property of the town of Beaufort." There is no admission of the fact, either express or implied, in the complaint, that the parcel of land to which the plaintiff claimed title by adverse possession ever was a street or alley of the said town; and hence the question as to whether title can be acquired to one of the public streets or alleys of a town by adverse possession, does not properly arise under the demurrer. We do not think, therefore, that there was any error in overruling the demurrer.

Turning then to the errors imputed to the circuit judge in rendering his decree, after hearing all the testimony and argument of counsel, it seems to us that, passing by the several errors imputed to the circuit judge in his findings of fact, which, under the view we take of the case, it would be improper for us now to consider, the fundamental inquiry is whether the judge erred in holding that title could be acquired to a public street or alley in a town by ten years' adverse possession, and whether twenty years' nonuser of such a highway is an abandonment of it. This subject is discussed with much learning and ability by Judge Dillon in his valuable work on Municipal Corporations, volume 2, sections 529--533, where, after showing that there has been a conflict of decision, he concludes that the following view is correct: "Municipal corporations, as we have seen, have in some respects a double character, one public, the other (by way of distinction) private. As respects property not held for public use or upon public trusts, and as respects contracts and rights of a private nature, there is no reason why such corporations should not fall within

limitation statutes, and be affected by them. For example, in an action on contract or for a tort, a municipal corporation may plead, or have pleaded against it, the statute of limitations. But such a corporation does not own, and cannot alien, public streets or places, and no laches on its part or that of its officers can defeat the right of the public thereto; yet there may grow up in consequence private rights of more persuasive force in the particular case than those of the public. It will, perhaps, be found that cases will arise of such a character that justice requires that an equitable estoppel shall be asserted even against the public, but if so, such cases will form a law unto themselves, and do not fall within the legal operation of limitation enactments. The author cannot assent to the doctrine that, as respects public rights, municipal corporations are within ordinary limitation statutes. It is unsafe to recognize such a principle. But there is no danger in recognizing the principle of an estoppel *in pais* as applicable to such cases, as this leaves the courts to decide the question, not by the mere lapse of time, but by all the circumstances of the case, to hold the public estopped or not, as right and justice may require."

In this state we have no authoritative determination of the question (unless it be in the case of *Owen v. Lucas*, 1 Brev. 519, where, however, the exact point was not decided, though the case does lend some support to our view), for the cases of *Parkins v. Dunham*, 3 Strob. 224, *Bowen v. Team*, 6 Rich. 298, 60 Am. Dec. 127, and *Hutto v. Tindall*, 6 Rich. 396, cited by the circuit judge, as well as the case of *Barnwell v. Magrath*, 1 McMull. 174, 36 Am. Dec. 254, were all cases between private individuals where the question with which we are concerned could not arise. It is true that in the case of *State v. Pettis*, 7 Rich. 390, the question under consideration might have been made, but it was not, perhaps, for the reason that the case went off upon another ground. In the absence then of any authoritative decision in this state, we are disposed to adopt the rule as laid down by Judge Dillon, *supra*, because it seems to us to have the support of reason. As we understand it, the theory upon which title by adverse possession rests is, that such possession for the required time affords a legal presumption that a title has been made, but has been lost; but where the party against whom title is asserted by adverse possession never had the power to make a title, there is no room for such a presumption; and this doctrine seems

to have been impliedly recognized in *Lamb v. Crosland*, 4 Rich. 536, though that is not the point decided in that case. Now, as a municipal corporation has no power to sell or alien the streets or alleys of a town, it would be altogether illogical to presume that it had done what it never had the power to do.

We think, therefore, that mere adverse possession, for the statutory period, of a street or alley in a town, which is a public highway, cannot confer a title. But where such possession is accompanied with other circumstances which would render it inequitable that the public should assert its rights to regain possession, then, upon the principle of estoppel, a party may be protected against the assertion of right by the public in order to prevent manifest wrong and injustice. For example, when a party, either under an honest conviction of right, has taken possession of a portion of one of the streets or alleys of a town, and expended his money in erecting buildings thereon, without interference on the part of the public, these or, perhaps, other circumstances connected with adverse possession for the statutory period may afford good ground for estoppel.

Upon the same principles, we do not think mere nonuser of a street or alley of a town, for the period of twenty years, will amount to such an abandonment as would destroy the rights of the public. The case of *Commissioners v. Taylor*, 2 Bay, 282, 1 Am. Dec. 647, which is cited to sustain a contrary view, does, at page 292, contain a remark that, to an indictment for a nuisance in obstructing a highway, nonuser would be a good plea; but that is manifestly a mere *obiter dictum*, and is not applicable anyhow, for it was made in reference to a case where the streets in question were never laid off, or opened, or used by the public, but simply delineated on a plat of a prospective addition to the town of Georgetown, which was never in fact made.

It seems to us, therefore, that the circuit judge erred in holding otherwise, and that, for this reason, the case must go back for a new trial upon the principles herein announced.

The judgment of this court is, that the judgment of the circuit court be reversed, and that the case be remanded to that court for a new trial.

HIGHWAYS, EXTINGUISHMENT OF, BY NONUSER OR OPERATION OF THE STATUTE OF LIMITATIONS: See, generally, notes to *Lessee etc. v. First Presb. Church*, 32 Am. Dec. 719-721; *Orr v. Brien*, 14 Am. St. Rep. 278-282; *County*

of *Yolo v. Barney*, 12 Am. St. Rep. 157. The last-mentioned case holds that the essential question in each instance is, whether the land has or has not been dedicated to public use. If it has been so dedicated, the statute does not run. A later case, deciding that the title of the city may be lost by adverse possession, is *Meyer v. City of Lincoln*, 33 Neb. 566; 29 Am. St. Rep. 500; and in *Wayne County Sav. Bank v. Stockwell*, 84 Mich. 586, 22 Am. St. Rep. 706, it was held that a highway acquired by user may be lost by non-user.

RUCKER v. SMOKE.

[87 SOUTH CAROLINA, 377.]

PRINCIPAL AND AGENT—LIABILITY OF PRINCIPAL IN EXEMPLARY DAMAGES FOR ACTS OF AGENT.—A principal, whether a corporation or an individual, may be held liable in exemplary damages to a third person on account of a wrongful, wanton, and malicious act of his agent, done within the scope of his agency, although such act is not previously authorized nor subsequently ratified by the principal.

C. J. Dantzler, for the appellant.

Andrew Crawford, and Melton and Melton, for the appellee.

McIVER, C. J. This case, briefly stated, is as follows: The defendant Buyck, holding a chattel mortgage on a mule in the possession of the plaintiff, placed the same in the hands of the defendant Smoke, with instructions to seize the mule and dispose of the same according to law. Acting under this authority, Smoke went to plaintiff's premises and demanded possession of the mule, with which demand plaintiff refused to comply, whereupon said Smoke broke open the stable of plaintiff and carried off the mule. Thereupon this action was commenced to recover damages for the trespass alleged to have been committed. The plaintiff having recovered judgment, the defendant Buyck alone appeals upon the several grounds set out in the record.

The first and second grounds having been abandoned, it remains only to consider the third and fourth, which are as follows: "8. Because his honor erred in charging the jury that if possession of the property was denied to Smoke as the agent of F. J. Buyck, and if, instead of obtaining that possession peaceably and lawfully, he resorted to a breach of the peace and violation of the criminal law, and went in there with a high hand and took the property, then he was violating the law of the land, and he is responsible, if nothing else is shown for that violation, and the principal is equally liable

with him; 4. Because his honor erred in charging the jury, in connection with the last above-alleged error, that 'if you conclude that the defendants acted wrongfully, as I have tried to explain the law to you, it is a question of fact for you to say whether they did it in an insulting manner, with a high hand; these are questions of fact for you to pass upon. -If you find that these defendants did do so, why, then, it is in your sound discretion to assess what damages should be inflicted upon them'; and in charging the jury that exemplary or vindictive damages, smart money, could be found against the defendant, F. J. Buyck, on account of the wrongful acts of his agent beyond the scope of his authority."

Counsel for appellant, in his argument here, claims that there are but two questions raised by this appeal: 1. Whether the appellant, Buyck, is liable for exemplary damages on account of the wrongful, wanton, or malicious acts of his agent Smoke, unless done by his previous authority, or subsequently ratified by him; 2. Is he liable for such acts of his agent beyond the scope of his authority? It seems to us that there is no foundation for the second question. As we read the charge of his honor, Judge Aldrich, which is set out in the "case," we do not find that the jury was instructed that Buyck, the principal, could be held liable, either in exemplary or any other kind of damages, for any act done by the agent Smoke beyond the scope of his authority. On the contrary, the jury were expressly instructed that, to make Buyck liable for any act done by Smoke, such act must be within the scope of his agency, as is shown by the following language taken from the charge: "And just here the maxim of law is, that whatever is done by the agent of another is done by the principal, *if done within the scope of his agency.*" And again: "Whatever of wrongdoing Smoke was guilty of, his principal, Mr. Buyck, would be responsible for, that is, if it was done *within the scope of his agency.*" So, too, the instruction which is made the basis of the third ground of appeal is substantially a quotation from the latter part of a connected sentence in the charge, which commences with the following interrogation: "Did Mr. Smoke go to the premises of F. B. Rucker, as the agent of Mr. Buyck, to foreclose the mortgage; did he actually go *in pursuance of that agency?* If he did," then, if he committed any breach of the peace or other violation of the criminal law, in obtaining the possession of the property, which he was sent there to seize, then both he and

his principal would be liable. It is quite clear, therefore, from these quotations from the charge (in which the italics are ours) that no such instruction was given to the jury as would raise the second question suggested by counsel; but that the instructions really given to the jury were just the contrary.

The first question, therefore, only remains to be considered. As we understand it, the proposition contended for by the counsel for appellant is, that a principal cannot be held liable for exemplary damages on account of a wrongful, wanton, or malicious act done by his agent, within the scope of his agency, unless such act be previously authorized or subsequently ratified by the principal. We do not think that this proposition can be sustained either by reason or authority. When one person invests another with authority to act as his agent for a specified purpose, all of the acts done by the agent in pursuance, or within the scope, of his agency, are, and should be, regarded as really the acts of the principal. If, therefore, the agent, in doing the act which he is deputed to do, does it in such a manner as would render him liable for exemplary damages, his principal is likewise liable, for the act is really done by him. To apply this doctrine to the facts of the case under consideration: If Smoke was appointed by Buyck as his agent to seize the mule covered by the mortgage, and he made the seizure which he was deputed to make in such a manner as would render him liable for exemplary damages, then Buyck would also be liable, for the reason that, both in law and in common sense, Buyck must be regarded as having himself done the act complained of.

This view is, we think, fully sustained by authority. In Story on Agency, section 452, quoted with approval by Mr. Justice McGowan in *Reynolds v. Witte*, 13 S. C. 18, 36 Am. Rep. 678, we find the rule laid down as follows: "It is a general doctrine of law that, although the principal is not ordinarily liable (for he sometimes is) in a criminal suit for the acts or misdeeds of his agent, unless, indeed, he has authorized or co-operated in them, yet he is held liable to third persons, in a civil suit, for the frauds, deceits, concealments, misrepresentations, negligences, and other malfeasances, misfeasances, and omissions of duty of his agent, in the course of his employment, although the principal did not authorize, or justify, or participate in, or, indeed, know of, such misconduct, or even if he forbade the acts or disapproved of them.

In all such cases the rule applies, *respondeat superior*; and it is founded on public policy and convenience, for in no other way could there be any safety to third persons in their dealings, either directly with the principal, or indirectly with him through the instrumentality of agents. In every such case the principal holds out his agent as competent and fit to be trusted, and thereby, in effect, he warrants his fidelity and good conduct in all matters within the scope of his agency. The rule is also well stated in 1 Am. & Eng. Ency. of Law, at page 410, in these words: "A principal is liable to third parties for whatever the agent does or says; whatever contracts, representations, or admissions he makes; whatever negligence he is guilty of, and whatever fraud or wrong he commits; provided, the agent acts within the scope of his apparent authority; and, provided, a liability would attach to the principal if he was in the place of the agent."

This rule has been repeatedly recognized or acted upon in this state, as shown by the following cases cited by respondent's counsel: *Parkerson v. Wightman*, 4 Strob. 363; *Redding v. South Carolina R. R. Co.*, 3 S. C. 1; 16 Am. Rep. 681; *Palmer v. Railroad Co.*, 3 S. C. 580; 16 Am. Rep. 750; *Epstein v. Brown*, 21 S. C. 599; *Hall v. South Carolina R'y Co.*, 28 S. C. 261; *Avinger v. South Carolina R'y Co.*, 29 S. C. 271; 13 Am. St. Rep. 716; and *Quinn v. South Carolina R'y Co.*, 29 S. C. 381. It is true that most of these cases were against corporations, and it is contended by counsel for appellant that the rule which has been applied to corporations should not be applied to natural persons, for the reason that corporations can act only through agents, while natural persons are not necessarily compelled to act through agents. We do not think there is any ground for such a distinction. The rule grows out of the relation of principal and agent, and is in no way dependent upon the character of the persons to which it is applied, and we see no reason why it should not be applied to natural as well as to artificial persons.

The judgment of this court is, that the judgment of the circuit court be affirmed.

EXEMPLARY DAMAGES AGAINST MASTER FOR ACT OF SERVANT: See generally notes to *Hagan v. Providence etc. R. R. Co.*, 62 Am. Dec. 379-389; *Spellman v. Richmond etc. R. R. Co.*, 28 Am. St. Rep. 876, 877. Later cases sustaining the doctrine that exemplary damages may be awarded against corporations for the wrongful acts of their agents are *Alabama etc. R. R. Co. v. Sellers*, 93 Ala. 9; 30 Am. St. Rep. 17; *Alabama etc. R. R. Co. v. Frazier*,

93 Ala. 45; 30 Am. St. Rep. 28; *Richmond etc. R. R. Co. v. Vance*, 93 Ala. 144; 30 Am. St. Rep. 41; *Samuels v. Richmond etc. R. R. Co.*, 35 S. C. 493; 28 Am. St. Rep. 883; *Purcell v. Richmond etc. R. R. Co.*, 108 N. C. 414; *Missouri Pac. R'y Co. v. Shuford*, 72 Tex. 165; *Patterson v. South etc. R. R. Co.*, 89 Ala. 318. To support a verdict for punitive damages in trespass, the plaintiff's statement need not aver wantonness, malice, or ill-will specifically, where it avers that the defendant tore down, demolished, and carried away plaintiff's fence and trampled down, and destroyed growing crops: *Kennedy v. Erdman*, 150 Pa. St. 427. For a statement of the general rule as to a master's liability for his servant's torts in terms similar to those used in the principal case, see *Gerhardt v. Boatman's Sav. Inst.*, 38 Mo. 60; 80 Am. Dec. 407; *Moir v. Hopkins*, 16 Ill. 313; 63 Am. Dec. 312.

SIMS v. MILLER.

[37 SOUTH CAROLINA, 402.]

FACTORS — SALE TO THEMSELVES. — When a factor, after making advances on the goods of his principal, buys them himself without instructions, and reports the sale and a balance due to the principal without disclosing the purchaser, the principal has a right to elect to affirm or repudiate the sale until he has knowledge that his factor is the purchaser; and if he subsequently affirms such sale he is entitled to recover the amount reported by the factor to be due him.

FACTORS — SALE TO THEMSELVES. — When a factor buys the goods of his principal without direction or consent of the latter, and without disclosing the purchaser, the principal may repudiate the sale upon obtaining knowledge as to the purchaser and recover the highest market value of the goods at any time before obtaining such knowledge although the factor may have made advances on such goods.

FACTORS — SALES TO THEMSELVES — RECOVERY BY PRINCIPAL — EXPENSES ON SUBSTITUTED GOODS. — When a factor, after making advances, himself buys the goods of his principal without direction to sell and then reports the sale and a balance due without disclosing the purchaser, the principal though at first declining to affirm the sale may afterwards affirm it and sue for and recover the balance reported to be due. The principal cannot be held to a lower market value of the goods at a time when he has given directions to sell subsequently to his disaffirmance of the first sale, nor can he be charged with insurance, storage, or interest, on other goods purchased by the factor subsequently to such disaffirmance to protect himself against the claim of his principal.

John P. Thomas, Jr., for the appellants.

R. W. Shand, for the appellees.

McGOWAN, J. It seems that the defendants were factors, doing a cotton business in Columbia, and that the plaintiffs had cotton in their hands upon which they had made considerable advances. On January 28, 1891, the defendants reported by letter to the plaintiffs that they had sold the cot-

ton for fifteen hundred ninety-two dollars, and inclosed a statement of the account of sales, showing that, after deducting the advances and interest, there remained, on January 28, 1891, the sum of two hundred twenty-six dollars and sixty-five cents due to the plaintiffs, and that is the amount for which the plaintiffs brought this action.

There was no formal answer, but by consent the defendants were allowed to make a statement, which was substantially as follows: That they had no orders to sell; but, having made advances in order to save themselves, they took the cotton themselves, allowing the fullest market price for the same; that they charged themselves with the amount, and after deducting therefrom the advancements and interest, reported the result to the plaintiffs, that there was due them a balance of two hundred twenty-six dollars and sixty-five cents. The plaintiffs refused to approve the proceeding, and in order to protect themselves, they (defendants) replaced the cotton,—that is, put a sufficient quantity in the warehouse for that purpose. On April 6, 1891, the plaintiffs wrote to them, offering to sell, and the defendants replied: "We sent you account of sales of the forty-four bales twice, and you returned them both times. We now inclose them again, and by these papers you will see that there is a balance to your credit of two hundred twenty-six dollars and sixty-five cents." On April 8th the plaintiffs wrote a letter, which was substantially an acceptance of the old statement, January 28th, inclosed also in the defendants' letter of two days before, viz., April 6th. But on that same day, April 8th, the defendants wrote another letter, inclosing a different statement of sales; that is to say, the identical statement (of January) except the deduction of items of account for storage, interest, etc., amounting to fifty-four dollars and eight cents; and that is the whole difference between the parties.

Under Judge Aldrich's charge, the jury found for the plaintiffs the amount originally admitted by the defendants to be due, two hundred twenty-six dollars and sixty-five cents.

The defendants appeal to this court upon the following grounds: 1. They except, because the presiding judge erred in charging the jury that, "where a factor undertakes to buy cotton from himself belonging to his principal, then the man who sends the cotton there has the right to elect whether he will stand by the sale, which is improper, or whether he will demand the value of the goods," the error consisting in the

erroneous application of the law to the case at bar, where the factor was selling to enforce his lien, and took the cotton at the highest market price, and notified the owner of such sale. In such case the plaintiffs had no right of election, unless the factors, Miller Brothers, chose to allow the same. 4. Because the judge erred in charging the jury that, "if a patron directs his factor to sell cotton, for instance, at a certain time, and the factor fails to do it, he can hold the factor to the amount of the value of the cotton at the time he directed it to be sold. If the factor sells without direction and consent of the patron, just does it of his own account, then the patron can hold him liable for the value of that cotton, the highest price for it any time up to the date of demand for it, if he sees fit." 5. Because the judge erred in not charging as the law of the case that the plaintiffs were only entitled to the price of the cotton at the time of direction to sell or demand, and that it was for the jury to say when that demand or direction to sell was made. Exceptions 2 and 3 were abandoned at the argument.

Exception 1 concedes that the general law is as stated by the judge, that, "where a factor undertakes to buy cotton from himself belonging to his principal, then the principal, the man who sends the cotton there, has the right to elect and choose whether he will stand by the sale of the factor to himself, which is improper, or whether he will demand the value of the goods": *Wadsworth v. Gay*, 118 Mass. 44. But it is claimed that it was inapplicable to this case, for the reason that the factor had made advances on the cotton, and that gave him such a general lien on the property as justified him in selling it without orders, or for less than the price fixed. "A factor is not justified in selling at a price below that fixed by the principal, from the single fact that he has made advances upon the property." There are cases where the factor, in order to save himself, may sell without orders, provided there is entire good faith. But we do not understand that such indulgence in a class of exceptional cases necessarily takes away the right of election where the factor sells to himself. The consignor's right to elect, of course, could not be exercised until the fact which authorized it was known. The judge left it to the jury to determine "when the plaintiffs learned the facts of the sale." Besides, the consignors did not sue the factors for the value of the property; but, after declining for a time, finally elected to affirm the sale and take what the factors reported as due to the plaintiffs, and

more than once—indeed, up to two days before—urged them to receive.

Exception 4 complains that it was error to charge the jury that, “if a patron directs his factor to sell cotton, for instance, at a certain time, and the factor fails to do it, he can hold the factor to the amount of the value at the time he directed it sold. If the factor sells without direction and consent of the patron, just does it of his own account, then the patron can hold him liable for the value of that cotton,—the highest price for it any time up to the date of demand for it, if he sees fit.” We do not think that, as a general proposition, this was erroneous. But if it were error, the defendants were in no way injured by it; for the action was not brought for the value of the property at any particular time, but for what it had been actually sold for, according to their own report repeatedly made. In a previous part of his charge the judge had already instructed the jury that if the factors were in advance to Sims & Co., they had a right to sell his cotton.

Exception 5 complains that the judge “erred in not charging as the law of the case that the plaintiffs were only entitled to the price of the cotton at the time of demand or direction to sell, and that it was for the jury to say when that demand or direction to sell was made.” From January to April the defendants insisted that the plaintiffs should be satisfied to take what they, the defendants, had charged themselves for the cotton. Between the 6th and 8th of April the defendants suddenly changed their minds, and refused to give that which they had so often proposed, unless an account for fifty-four dollars and eight cents for storage, insurance, and interest, from the time of the January sale, should be deducted, leaving the amount due one hundred seventy-two dollars and fifty-seven cents. Assuming the correctness of the defendants’ statement, that after the cotton of plaintiffs was sold and they refused to ratify the sale, the defendants looked around, and, for the purpose of protecting themselves, purchased other cotton of the same class and amount,—if this be the correct statement, we agree that the storage, insurance, interest, etc., upon that substituted cotton should not properly be charged to the plaintiffs, Sims & Co.

The judgment of this court is that the judgment of the circuit court be affirmed.

FACTOR’S POWER OF SALE AFTER MAKING ADVANCES ON PRINCIPAL’S GOODS. — The single fact that a factor has made advances will not authorize

him to sell for a less price than that fixed by his principal: *George v. McNeil*, 7 La. 124; 26 Am. Dec. 498; but he may sell upon notifying his principal to sell within a reasonable time: *Blot v. Borceau*, 3 N. Y. 78; 51 Am. Dec. 345; *Davis v. Kobe*, 36 Minn. 214; 1 Am. St. Rep. 663; *First Nat. Bank v. Ege*, 109 N. Y. 120; 4 Am. St. Rep. 431, and monographic note to *Bigelow v. Walker*, 58 Am. Dec. 160. At the same place some cases are given in which the measure of damages for a factor's failure to sell at the time appointed by his principal is discussed. Neither custom nor the factor's intention to benefit his principal, will excuse him for violating his instructions: *Hatcher v. Comer*, 73 Ga. 418. The measure of damages, where the consignee of goods who has advanced money upon them and sells them for a less price than that fixed by the consignor, without notice to him, is the difference between the market value of the goods when sold and the price for which they were sold, if the market value has not increased before suit brought, less the amount of advances, returns, discounts, and commissions: *Dalby v. Stearns*, 132 Mass. 230.

CURNOW v. PHOENIX INSURANCE COMPANY.

[37 SOUTH CAROLINA, 406.]

INSURANCE — CONFLICT OF LAWS — PLACE OF CONTRACT. — When an insurance company having its home office in one state issues a policy upon property situate in another state to a resident thereof, and through its authorized agent therein as provided by the policy, the contract of insurance is deemed to have been made in the state where the property is situated, and after loss thereunder, and proof of such loss, coupled with a refusal to pay, the insured or his assignee may bring an action to recover on the policy in the latter state.

INSURANCE — PLACE OF CONTRACT. — When, by the terms of an insurance policy, it is not binding unless countersigned by an agent residing at a particular place, that place must be regarded as the place where the contract is made, and the laws and usages of such place must govern in the interpretation of the contract.

INSURANCE — CONFLICT OF LAWS — PLACE OF PAYMENT. — A provision in a policy of insurance that loss thereunder shall be paid sixty days after due notice and proof of loss have been received at the office of the company, in accordance with the terms of the policy, does not stipulate for payment at the "home office" of a foreign insurer, but only postpones payment until sixty days after notice and proof of loss is received at that office.

J. N. Nathans, for the appellant.

Bryan and Bryan, for the appellee.

McGOWAN, J. The defendant company, by its agents duly qualified and authorized thereto, executed its policy of insurance in writing, and thereby insured Mrs. A. J. Levy against loss or damage by fire, to the amount of two thousand five hundred dollars, on a stock of merchandise, consisting principally of dry goods, groceries, notions, etc., contained in the

one-story building situate on south side of Railroad Avenue Street, in the town of Blackville, South Carolina. On October 18, 1889, said stock of merchandise was totally destroyed by fire, of which loss notice and proofs were given, and payment demanded within the time prescribed; but the defendant corporation refused payment and denied liability. Afterwards, on April 22, 1890, the said A. J. Levy duly assigned said policy of insurance and all moneys due thereon to the plaintiff, Sarah V. Curnow, upon certain trusts, and for the purposes in said deed of assignment more particularly set forth; and on May 15, 1890, the said assignee brought this action against the defendant company for the insurance money, two thousand five hundred dollars, in the county of Barnwell, South Carolina. The defendant company answered to the merits, admitting some paragraphs of the complaint and denying others. The case seems to have been in the United States court, but was "remanded" to the state court.

The cause came on for a hearing before Judge Wallace, who, on motion of the counsel for the defendant, dismissed the complaint, "because it appears that the plaintiff is a nonresident of this state, the defendant is a foreign corporation, and the cause of action did not arise in this state, and the subject of the action is not situated in this state," etc. Then the plaintiff moved to be allowed to amend her complaint, by adding thereto a copy of the assignment referred to in the complaint, claiming that the same would show that Mrs. A. J. Levy, a citizen of this state, and the original holder of the policy, still has a substantial interest therein. This motion was refused, on the ground that the court, having no jurisdiction of the action, can make no order in the cause. At the suggestion of counsel, the judge stated, "that the word 'record' is used to embrace only such part of the record as was submitted to him at the argument of the motion, which was the complaint and the papers to which it referred." The plaintiff appeals to this court from the order dismissing the complaint herein, and from the judgment entered up thereon, and from the order refusing the motion of the plaintiff to amend the complaint herein, upon the following grounds: —

1. Because the policy sued on was issued by the defendant through its agent in this state on property in this state, where the loss occurred, and the policy and the loss there-

under was the cause of action, and his honor, therefore, erred in dismissing the complaint for want of jurisdiction.

2. That it appears from the complaint and the policy attached thereto that the assured, A. J. Levy, was a resident of this state, the property insured situate in this state, and that subsequent to the loss, and after proof of loss by her, she assigned her right of action in and upon certain uses and trusts only, and the circuit judge erred in holding that the court was without jurisdiction.

3. That, under and by virtue of chapter 37, sections 1353, 1354, of the General Statutes of South Carolina, the courts of this state have jurisdiction of all actions against foreign insurance companies doing business in this state, for liabilities incurred in this state, and the action herein was a liability incurred in this state; and the circuit judge erred in holding that he did not have jurisdiction.

4. That the defendant was a foreign insurance company doing business in this state, with a duly authorized agent, upon whom service could be made, as required by chapter 37, General Statutes, and upon whom service was made in this case; and the liability upon which the action herein was brought having arisen upon a policy issued in this state, upon property situate within this state, both at the time of issuing the policy and of the loss, the circuit judge erred in holding that the court was without jurisdiction.

5. That the circuit judge erred in holding that he did not have power to grant the amendment asked for.

6. That the amendment asked for by the plaintiff was in the interest of right and justice, and his honor, the circuit judge, erred in not allowing the same.

Section 423 of the Code, provides that, "an action against a corporation by or under the laws of any other state, government, or country, may be brought in the circuit court: 1. By any resident of this state, for any cause of action; 2. By a plaintiff not a resident of this state, when the cause of action shall have arisen, or the subject of the action shall be situated within this state."

There was interesting argument at the bar as to whether the provisions of chapter 37 of the General Statutes do not, in the case of foreign insurance companies, authorize, by necessary implication, an action by a nonresident upon a policy of insurance issued in this state, through a local agent established in the state, upon property situate in this state, at the

time of insurance and loss thereunder. It is certainly true that the chapter of the General Statutes referred to contains some exacting requirements as to a foreign insurance corporation doing business in this state; as, for instance, that said company must take out a license from the comptroller general of the state, and have a reliable local agent in the state, whose warrant of appointment shall continue valid and irrevocable until another agent or attorney has been substituted, so that at all times, while any liability remains outstanding there shall be within the state an agent or attorney as aforesaid, and shall contain a consent, expressed, authorizing process of law, to be served on said agent or attorney, for all liabilities of every nature incurred in this state by said company, etc. This would seem to have in contemplation legal proceedings in this state for all liabilities incurred in this state. But we do not think it necessary to go into that matter in this case, and we make no ruling upon the subject.

Then recurring to section 423 of the Code. It is sometimes difficult to have a clear view of what is "the subject of the action." As I understand, this is not a simple money demand, although in case of recovery the amount is fixed; but an agreement for the performance of mutual covenants as to particular property. But, as we think, it is less difficult to determine whether the cause of action arose within this state. It is obvious that, by the loss of the goods, the proper proofs, and the refusal of the defendant company, upon demand, to pay the insurance, the cause of action had accrued before the assignment of the policy to the plaintiff. If Mrs. Levy, the assured, had brought the action herself, no possible objection could have been made to the jurisdiction, and it seems to me that it would seem rather a strange result, if the identical cause of action already accrued could not be enforced in our courts by one who became the assignee of the right, primarily for the purpose of saving a debt due to herself, simply for the reason that she happened to be a nonresident of the state.

But where did the cause of action arise? "When a contract is made in one place, and to be performed in another, the cause of action upon such contract arises at the latter place": *Rodgers v. Mutual Endowment Ass'n*, 17 S. C. 410. But, "in the absence of anything indicating the contrary, the place of the making of a contract is presumably that of its performance by the law whereof it is to be interpreted and its effect defined": Bishop on Contracts, sec. 1391. Where was

this contract of insurance made? Most certainly, in the state of South Carolina; the property insured was situate in South Carolina, the owner of it lived in South Carolina, and, so far as appears, was never out of the state, her negotiations for insurance having been with the agent of the defendant company, located and authorized by law to do business in this state. It is true, that the printed policy was issued from the "home office" of the company at Hartford, Connecticut, but it was not delivered in Connecticut, the policy itself declaring, "that it should not be valid until countersigned by the authorized agent of the company at Blackville, South Carolina." In accordance with this condition, the policy was "Countersigned at Blackville, February 22, 1889," (signed) R. M. Mixon, agent. We think that the delivery of this policy at Barnwell, South Carolina, by their authorized agent, for and in behalf of the company, was the contract of insurance, and that it was made in South Carolina, and that being breached here, the cause of action arose in South Carolina. "If, however, by the terms of the policy, it is not to be binding unless countersigned by an agent resident at a particular place, that place must be regarded as the place where the contract is made, and the laws and usages of that place must govern in the interpretation of the contract": May on Insurance, sec. 66 and authorities.

It is insisted, however, that by the express stipulations of the policy, the insurance, in case of loss, was to be paid at the "home office" of the defendant corporation; and, therefore, in that respect, the case is like that of *Rodgers v. Mutual Endowment Ass'n*, 17 S. C. 410. We think this view is founded on a misconstruction of the policy. The paragraph of the policy that is relied on reads as follows: "And to be paid to the assured, or the assured's legal representatives, sixty days after due notice and satisfactory proof of the same have been received at this office, in accordance with the terms of this policy hereinafter mentioned." The only reference here made to the payment of the insurance was as to whom the payment should be made, and to the time—sixty days after notice and satisfactory proof of the same should be received at their office, etc. It is manifest that the mention of their office referred only to the receipt of the notice and proofs; and if confirmation of this were necessary, it is found in the words which immediately follow, "in accordance with the terms of the policy hereinafter mentioned"; which could not appro-

priately apply to payment, but to the particular instructions contained in the policy as to notice and manner of proof. We think the policy contains no stipulation that the insurance, in case of loss, was to be paid at the "home office," Hartford, Connecticut, and that this case differs essentially in several respects from that of *Rodgers v. Mutual Endowment Ass'n*, 17 S. C. 410.

In the case of *Central R. R. etc. Co. v. Georgia etc. Co.*, 82 S. C. 319, both the plaintiff and defendant were foreign corporations or companies, but it appeared that there was a contract to do work on a railroad, part of which was in South Carolina and part not; and it was held that as to work done in South Carolina, the cause of action arose in this state. In that case, the chief justice, in delivering the judgment of the court, said: "Under this state of facts, we cannot say that the circuit court erred in holding, that the cause of action in this case, to large extent, arose in this state (as to the work done in this state), and hence this action, as well as the attachments issued in aid thereof, may be sustained, to the extent at least, which these plaintiffs may be able to show at the trial, that they have a cause of action which arose in this state," etc. We think the cause of action in this case arose within this state, and that it was error to dismiss the complaint for the want of jurisdiction.

The judgment of this court is, that the judgment of the circuit court be reversed, and the case remanded for such proceedings as may be necessary to carry out the conclusions herein announced.

CONFLICT OF LAWS—LEX LOCI CONTRACTUS.—PLACE WHERE CONTRACT IS DEEMED TO HAVE BEEN MADE: See generally note to *Ford v. Buckeye State Ins. Co.*, 99 Am. Dec. 668-675, especially p. 671, where insurance contracts are discussed, and several cases are cited to the point that, if the agent of a foreign insurance company is required to countersign the policy before delivery, the contract is controlled by the law of the state in which the agent delivers it: *Cromwell v. Royal Canadian Ins. Co.*, 49 Md. 366; 33 Am. Rep. 258. A contract concerning personalty should ordinarily be construed according to the laws of the country with reference to which it was made: *Richardson v. De Giverville*, 107 Mo. 422; 28 Am. St. Rep. 426; and, in the absence of evidence, it will be presumed that the residence of a party to the contract is at the place where the contract was made: *Taylor v. Sharp*, 108 N. C. 377.

BOMAR v. MEANS.

[87 SOUTH CAROLINA, 820.]

CREDITOR'S BILL — PARTIES. — SEVERAL AND SEPARATE JUDGMENT CREDITORS may unite as plaintiffs in one bill to have alleged fraudulent conveyances executed by their common debtor set aside as in fraud of their rights.

DEMURRERS ADMIT ALL FACTS PROPERLY ALLEGED, and the sufficiency of the complaint must be decided on the facts as alleged.

FRAUDULENT CONVEYANCES — PARTIES TO ACTION TO SET ASIDE. — In an action to set aside conveyances as fraudulent as against creditors, the original grantee, through whom such conveyances passed, but who has no legal or equitable interest under them, is not a necessary party.

FRAUDULENT CONVEYANCES. — JOINDER OF CAUSES OF ACTION TO SET ASIDE different conveyances and transactions with different persons at several different transfers, made by a debtor with the design of defrauding his creditors, may be attacked by them in one action.

W. W. Thomson, for the appellant.

Carlisle and Hydrick, for the appellee.

McGOWAN, J. This is an action to set aside certain conveyances, mortgage, bill of sale, confession of judgment, etc., as fraudulent as to creditors. The complaint is long, and, among other things, substantially states, that the plaintiff and others have judgments obtained at different times against Albert G. Means, Sr.; that on April 12, 1888, three of the judgments' creditors, viz., William T. Russell, J. A. Lee and Son, and Andrew Holtzhouser, obtained their judgments in Spartanburg County; that no part of either of them has been paid; that the executions of the two last-named creditors have been long since returned "unsatisfied," and that the debtor, Albert G. Means, is utterly insolvent. The judgments were "transcribed" to Union County, in which the debtor owns a valuable plantation. Certain personal property was levied by the sheriff, whereupon the defendants (except H. F. Means and Albert G. Means, Sr.), who are the children of the debtor, A. G. Means, instituted proceedings against the sheriff, claiming that the property levied belonged to them, under a bill of sale to be hereafter more particularly mentioned. The judgment creditors, in the sheriff's name, defended the suit, on the ground that the aforesaid bill of sale was fraudulent and void. The contest resulted in favor of the judgment creditors, and from the decision an appeal is now pending. That on March 4, 1889, the debtor, Albert G. Means, Sr., executed to his brother, H. F. Means, a mort-

gage on a lot in the city of Spartanburg, nominally to secure the payment of a large note, as to which, plaintiffs are informed, that payments have been made, and that there is an agreement whereby the brother, H. F. Means, is to accept a particular sum in full satisfaction of the whole debt; that plaintiffs are informed that on December 30, 1887, the said defendant, A. G. Means, Sr., being then insolvent, with the intent to evade the provisions of the assignment act, made to one Robert Beaty, Sr., who was his father-in-law, a mortgage to secure an alleged debt of six thousand dollars on the lot before described, and also a bill of sale of all his personal property, and also a confession of judgment for eight thousand two hundred fifty-four dollars and forty-one cents; which said instruments, together with the liens previously given, far more than cover the balance of all the property then owned by the said debtor; that each of the aforesaid instruments were immediately assigned by the said Robert Beaty, Sr., to the defendants, who are the children of the said A. G. Means, Sr., and the grandchildren of the said Robert Beaty; that the debts alleged to have been due to the said Robert Beaty, and for which the said mortgage, bill of sale, and confession of judgment are alleged to have been given, were and are wholly pretensive and fraudulent, etc.; that the defendant, H. F. Means, sold the aforesaid lot, mortgaged for ten thousand eight hundred dollars, for more than enough to pay the debt due to him, and the defendants (except as before excepted) claim the surplus proceeds of said sale, etc. Whereupon the plaintiffs pray for an order enjoining the defendant, H. F. Means, from paying the surplus proceeds of sale to any of the defendants, and that he be required to pay the same into this court, to be applied to the liens upon said property according to their priority; and that the mortgage, bill of sale, and confession of judgment given to Robert Beaty, Sr., by A. G. Means, and assigned to the defendants named herein, be adjudged fraudulent and void, and set aside, etc.

The defendants (except H. F. Means) demurred to the complaint, as we understand it, upon three grounds: 1. That the executions upon the judgments of William T. Russell, Jane Holtzhouser, as administratrix, and J. A. Lee and Son, were duly levied by the sheriff of Union County, who hath made no return to, and no proper proof of, the disposition of said liens; 2. That there is a defect of parties de-

fendant and nonjoinder of Robert Beaty, Sr., the original grantee, who for value assigned in part to said defendants, except H. F. Means, the bill of sale, and the confession of judgment, alleged to be fraudulent and void in the complaint; 3. That several causes of action have been improperly united — one being for the distribution of an alleged surplus fund, another for the cancellation of a bill of sale and mortgage given by A. G. Means to Robert Beaty, and by the latter assigned, as alleged in the complaint, and yet another for the cancellation of a confession of judgment made by A. G. Means, Sr., to Robert Beaty, Sr., and by him assigned, as alleged in the complaint.

His honor, Judge Fraser, overruled the demurrer, and further ordered that such of the defendants as had not heretofore answered have leave to answer the complaint within twenty days from the written notice of this order. The defendants appealed upon several grounds, which, as we understand them, are as follows:—

“1. That his honor erred in assuming that the defect of parties, as alleged in the demurrer, was really an allegation that there is a misjoinder of parties plaintiffs.” If the assumption of the circuit judge was wrong we are not sure that we understand clearly the precise point intended to be made by the first ground of demurrer. Four several judgment creditors united as plaintiffs to bring an action in equity, to set aside certain mortgages, bills of sale, and a judgment confessed, alleged to be fraudulent and void as to creditors. It is true that such a proceeding, called a creditors’ bill, is usually brought in the name of one creditor for himself and such others as will come in and contribute to the expenses. But I do not understand that where several judgment creditors go on the record as plaintiffs, it is a misjoinder of plaintiffs, of which the defendant debtor, or those who claim under him, have any right to complain. The judgment creditors do not thereby make themselves partners with the other creditors, or claim that they have a joint interest in the cause of action, but that, as creditors, they are separate and distinct, having an interest in common to set aside fraudulent conveyances of their common debtor, which stand in the way of their being paid according to their respective priorities.

“2. Because his honor erred in assuming that the mere allegation of the insufficiency of the levy was competent and sufficient evidence to dispose of said levy, and to rebut the

legal presumption of satisfaction arising from the levy." It seems to have been overlooked that the case was not being tried on its merits, but the only question was whether the judge should sustain the demurrer, which from its very legal character admitted the statement of facts as contained in the complaint. The inquiry was not for "evidence," but "allegations." It was alleged distinctly that nothing had been paid on any of the executions, and that, in fact, at least two of them had been returned "unsatisfied."

3. Because his honor erred in not holding that Robert Beaty, the original grantee, is not a necessary party to the action. Beaty was not the debtor, but, as alleged, the grandfather of most of the defendants, and, as alleged, some of the fraudulent conveyances passed through him merely to promote and forward the general scheme of defeating the creditors of his son-in-law, Means. Beaty had no legal or equitable interest, and was not a necessary party: See *Irby v. Henry*, 16 S. C. 617, and authorities.

4. The other exceptions complain, "that the judge erred in not holding that several causes of action were improperly united in the complaint." We agree with the circuit judge that while there were several different transactions with different persons and at different times, there was, in fact, but one cause of action,—that which arises from the right of the creditors to have the property of their debtor applied to the payment of their debts, which right, as alleged, all the defendants were assisting to defeat, by placing his property beyond the reach of his creditors. One of the most useful and wholesome principles of equity is, that being averse to doing things by halves, it delights in rendering complete justice. See the case of *State v. Foot*, 27 S. C. 340, where it was held, "that a judgment creditor may bring his single action to vacate mortgages fraudulently executed by his debtor at one time, and an assignment for the benefit of creditors fraudulently and collusively executed by this same debtor at another time. This is but one cause of action, the attempted fraudulent disposition by all the defendants of the debtor's property to defeat the plaintiffs' claim": See the authorities there cited by the chief justice in delivering the judgment.

The judgment of this court is, that the judgment of the circuit court be affirmed.

FRAUDULENT CONVEYANCES, SUIT TO SET ASIDE—PARTIES PLAINTIFFS.
Unconnected parties may unite in a suit, if there is one connected interest

among them all centering in the point in issue in the case: *Fellows v. Fellows*, 4 Cow. 682; 15 Am. Dec. 412. Therefore a bill is not multifarious in which the complainants are creditors of the same party and seeking to subject the same fund to their claims: *Comstock v. Rayford*, 1 Smedes & M. 423; 40 Am. Dec. 102. See, generally, note to *Hagerman v. Buchanan*, 14 Am. St. Rep. 739.

DEMURRERS ADMIT ALL FACTS PROPERLY PLEADED: *Supply Ditch Co. v. Elliott*, 10 Col. 327; 3 Am. St. Rep. 586; *Manning v. Pippen*, 86 Ala. 357; 11 Am. St. Rep. 46.

FRAUDULENT CONVEYANCES, SUIT TO SET ASIDE — PARTIES DEFENDANT. The rule that one who has no legal or equitable interest in the property conveyed is not a necessary party is applied in a case where a creditor seeks to subject to the payment of a debt due to him the land fraudulently conveyed by a deceased debtor. To such an action the heirs of the debtor are not necessary parties: *Smith v. Grim*, 26 Pa. St. 95; 67 Am. Dec. 400. So, too, the holder of a bill may maintain a suit to set aside a fraudulent conveyance executed by the indorser, without joining the maker or drawer as defendants: *McGhee v. Importers' etc. Nat. Bank*, 93 Ala. 192.

EQUITY PLEADING. — A BILL IS NOT MULTIFARIOUS which unites two good causes arising out of the same transaction, all the defendants being interested in the same claim of right, and relief of the same general character being asked in relation to each: *Varick v. Smith*, 1 Paige, 137; 28 Am. Dec. 417. Thus a bill to set aside deeds of gift made at various times to the defendants, the children of the debtor, is not objectionable for multifariousness: *Williams v. Neel*, 10 Rich. Eq. 338; 73 Am. Dec. 94. So, too, if real estate is conveyed to one person for a valuable consideration, which is paid by another, for the purpose of avoiding the latter's creditors, the creditors may have a complete remedy in one action: *Lindley v. Oress*, 31 Ind. 106; 30 Am. Dec. 610.

CASES
IN THE
SUPREME COURT
OF
TEXAS.

MURRELL v. MANDELBAUM.

[85 TEXAS, 22.]

PARTNERSHIP IN LANDS. — Whether land belonging to a firm or conveyed to a firm is to be considered as part of the partnership stock depends on the intention of the parties, to be ascertained from their acts or their agreements, express or implied. Land may be made part of the partnership stock under a parol agreement of the partners.

PARTNERSHIP IN LANDS. — When real estate is part of the partnership effects, it is to be treated in equity, to all intents and purposes, as a part of the partnership funds and held subject to all the equitable rights and liens of the partners which would apply to it if it were personal estate.

A PAROL PARTITION OF LANDS IS VALID.

PARTNERSHIP LANDS, PAROL CONVEYANCE BY ONE PARTNER TO THE OTHER.

If the property of a partnership consists of real and personal estate, and the partners settle their business and dissolve their partnership, agreeing that one of them shall have the real and the other the personal property, and such agreement is followed by the taking and keeping of the personal property by the partner to whom it is thus allotted, this is equivalent to a parol partition of the lands, and vests the title thereto in the partner by whom it was to be retained.

VENDOR AND VENDEE — PURCHASERS WITH NOTICE. — If one purchasing land standing of record in the names of two persons is informed before the purchase that one of such persons, or his grantee, claimed the whole of such land, the purchase must be regarded as subject to such claim, and therefore liable to be defeated by proof that the land had been acquired by the two persons as partners, and had been set aside to one of them on a settlement of their partnership business.

L. J. Farrar, for the appellant.

Croft and Croft, and J. M. Blanding, for the appellee.

HOBBS, P. J., Section A. This suit was brought by A. Mandelbaum on the fourth day of March, 1889, against B. Mur-

rell, to recover the land described in the petition as a tract of two hundred five acres out of the Joshua Graham league and labor survey.

The defendant disclaims as to one half of the two hundred and five acres, and defends as to the remaining half, and alleges that he and plaintiff are tenants in common as to the entire tract, and prays for partition, etc.

The cause was tried by the court without a jury, and the presiding judge filed his conclusions of fact and law, and rendered judgment for plaintiff. The defendant Murrell appeals.

James A. Graham is the common source of title. He conveyed the land in dispute, two hundred five acres, to Simon and Brash on May 18, 1862. Simon and Brash was a mercantile firm, engaged in business in Springfield, Limestone County, Texas. The firm had been so engaged from 1856 to 1860, when it was dissolved by mutual consent. According to the testimony of Simon, the property or assets of the firm were divided between them. It consisted of the land in controversy, a house and lot in Springfield, a land certificate, some horses, sheep, and cattle, and about eight thousand dollars. Brash, so testified Simon, desired to leave the country, and it was agreed that he should take the money, eight thousand dollars, and Simon was to take, and did take, the balance of the firm property as his own, and agreed to pay, and did pay, the firm debts, amounting to seven hundred or eight hundred dollars. Brash left the country in 1864, and never returned. No deed or conveyance in writing was executed by him to Simon.

Plaintiff then introduced in evidence deed from B. Simon, who was a member of said firm, to A. L. Steele, dated April 5, 1872, filed for record April 18, 1872, conveying all of said land to Steele.

Deed from said Steele to Henry Simon to this land, dated January 5, 1874, recorded January 15, 1874. Deed from Henry Simon to plaintiff Mandelbaum, dated March 3, 1880, conveying this land. Deed from other heirs of B. Simon, dated March 17, 1888, conveying their interest in the land to plaintiff. The foregoing deeds recite that the land was conveyed on May 18, 1862, to Simon and Brash.

Defendant introduced power of attorney and deed from Louis Brash (one of the firm of Simon and Brash) to W. C. Day and John G. Kirksey, dated April 19, 1888, recorded

May 7, 1888. This conveyance authorizes them to take possession of and sell, etc., one half of said two hundred five acres of land, and conveying to them, in consideration of certain services, etc., one half of one half of said two hundred five acres.

Deed from said Brash to his remaining interest in the land, and other lands, for a consideration of seven hundred fifty dollars, dated June 6, 1888, recorded in Limestone County, June 19, 1888.

Deed from Day and Kirksey to defendant B. D. Murrell, conveying one half of the two hundred five acres in dispute, dated November 2, 1888.

Brash testified at great length about the dissolution of the partnership and the circumstances under which he left Springfield in 1864. He denied that the property of the partnership was divided, as stated by Simon. He said the money (about five thousand dollars) was equally divided, and the balance of the property, including this land, remained there as the property of Simon and Brash. The assets of the firm consisted of about ten bales of cotton, some merchandise, one hundred fifty-two head of horses, four hundred head of sheep, some other personal property, besides five thousand dollars in money and the real estate. All, except the money, remained in the possession of Simon when he left, in 1864, and one half of it was his (Brash's). No agreement was made concerning the property. He testified to having paid the firm debts in New York of seven hundred or eight hundred dollars.

The defendant proved, that in May, 1888, the attorney or agent of plaintiff came to Limestone County, and proposed to sell plaintiff's interest or buy Brash's title. That he claimed only one half of the land as plaintiff's. At that time Day and Kirksey held Brash's power of attorney to one half interest only of Brash. Their purchase of said Brash's remaining interest (one fourth) in the two hundred five acres was in June, 1888. Had no notice of plaintiff's claiming any more when they purchased, in June, 1888.

They examined the county records March 14, 1888, and found deed from Graham to Simon and Brash, B. Simon to Steele, Steele to H. Simon, H. Simon to plaintiff. These last-named deeds conveyed the entire tract, together with other lands, etc. This land was then unoccupied. Brash gave

them a power of attorney, and authorized them to recover the land, etc.

Day and Kirksey, on March 9, 1888, saw B. Simon and his son Henry Simon, who refused to discuss the matter. B. Simon stated that he had sold all of the land, as he had a right to do.

Day and Kirksey purchased Brash's one-half interest for seven hundred fifty dollars. They conveyed to appellant, B. D. Murrell, who was in possession; when this suit was brought; but it does not appear that he paid anything for it.

Barry, appellee's agent, testified, that when he went to Limestone County to look after appellee's land, he told Day and Kirksey that Mandelbaum claimed all of the two hundred five acres.

The court found that the land, with other property belonging to the firm of Simon and Brash, and constituting the entire assets of the partnership, was divided between them on the dissolution of the firm in 1864; Brash, according to the agreement then entered into by them, taking the money, and Simon taking all of the remaining property, including that in controversy, and assuming the payment of the firm's debts. This agreement was verbal. But under it Brash received the eight thousand dollars and left the state, and Simon sold some of the property and paid the debts amounting to seven hundred dollars. He remained in control of the assets of the firm, and paid taxes on the land until he sold it. That Brash for twenty-five years made no claim, and in 1888, for value, conveyed his interest to Day and Kirksey. Before their purchase, they knew from the records that plaintiff claimed the whole tract under Simon. They sold to defendant Murrell, but there is no proof of the payment of a valuable consideration by him.

Upon these facts the conclusions of law found by the court were, that the verbal agreement or division of the property between Simon and Brash, to the effect that the latter would take the money of the partnership and the former the balance of the property, was valid, the land being in equity treated as mere personalty upon settlement between partners, and that it therefore became the separate property of Simon.

The court found, also, that if such agreement was not valid, still the interest in the partnership land would not be an undivided one half, but one half of the balance, according to value, after settlement between the partners, each accounting

for all money and advances received by him; and that the partner receiving as much or more than his pro rata of the assets of the firm in money or otherwise, would not be entitled to any of the balance of the assets; and as Brash received eight thousand dollars in gold, which was equal in value to the balance of the property, Simon was in equity entitled to the latter.

Judgment was therefore rendered for plaintiff.

The important questions in the case are: —

1. Whether the land in controversy was partnership property of the firm of Simon and Brash, with the legal incidents resulting therefrom, or did they hold it as tenants in common.

2. Whether a parol conveyance of one partner's interest in the land is valid when made to the other partner in the settlement of the partnership affairs and the division of all the assets of the firm upon the dissolution of the partnership by mutual consent.

There is sufficient evidence, we think, to support the court's finding of fact that this land was the partnership property of the firm of Simon and Brash.

"Whether land belonging to the firm, or conveyed to the firm, is to be considered as part of the partnership stock," it is said, "will depend on the intention of the partners, to be ascertained from the acts or agreements, either express or implied."

It may be made to be a part of the partnership stock by parol agreement of the partners: *Arnold v. Wainwright*, 6 Minn. 358; 80 Am. Dec. 450. The land was acquired during the existence of the partnership and in the firm name. This alone, however, it has been held, is not sufficient to establish the fact: *Alkire v. Kahle*, 123 Ill. 499; 5 Am. St. Rep. 540.

The testimony of Simon and that of Brash shows that it was regarded by them as a part of the partnership stock. As assets of the firm, it was divided between them. In the case cited and relied on by appellant, it is said in the opinion: "There was no evidence that the land was appropriated to any purposes of the partnership. . . . All that appears in this respect, aside from the description in the deed, is that Abbott and Robinson, in giving their testimony herein, some five years after the dissolution of the partnership, in enumerating the assets, etc., class this land among them."

In addition to this evidence in the case before us, the testi-

mony of Simon and Brash shows that they treated this land as stock of the partnership; and it was appropriated by them in the division to partnership purposes when it was allotted, with other property of the firm, to Simon to pay and discharge partnership debts.

"Each partner is entitled to regard the whole estate as held for his indemnity as against the joint debts and as security for the ultimate balance which may be due him for his own share of the partnership effects": *Arnold v. Wainwright*, 6 Minn. 358; 80 Am. Dec. 450.

"When real estate is a part of the partnership effects, it is to be treated in equity to all intents and purposes as a part of the partnership funds; and whatever may be the form of the conveyance, it will be held subject to all the equitable rights and liens of the partners which would apply to it if it were personal estate": *Arnold v. Wainwright*, 6 Minn. 358; 80 Am. Dec. 450.

And this is the rule, although the legal title may, by the death of the party holding it, be cast by descent on his heirs at law.

The court found that the partnership property had been about equally divided between them; that Simon assumed the payment of, and did pay, the firm debts; that he paid the taxes on the property he received in the partition and on this land up to its sale from 1864. The equitable title to the land was in him.

If Brash had brought suit against Simon to recover this land under the facts of this case, there is no principle of equity that would have entitled him to recover it.

Upon the theory that Simon and Brash owned the land as tenants in common, a parol partition of the land would have been recognized as valid. It has been repeatedly decided in this state that such partition between tenants in common is not within the statute of frauds.

In such a partition, Brash's transfer or conveyance of the interest allotted to Simon would have been by parol. So, too, in the present case, his conveyance of his interest is by parol. The fact that the land itself was not partitioned, and that all of Brash's interest was conveyed to Simon, only made the interest conveyed by Brash greater than it would have been had there been a parol division of the land between them. There would be no difference in principle between a parol partition of the land between them and a parol conveyance

by Brash of his interest to Simon, under the facts in this case.

Day and Kirksey were informed by Barry, who came to see them about the land in May, 1888, that Mandelbaum claimed the whole tract. He was acting as appellee's agent. Day and Kirksey had then only a power of attorney authorizing them to recover said land, dated in April, 1888. In May, 1888, they saw B. Simon, who told them he had a right to sell the whole tract. The deed from Brash to Day and Kirksey is dated June 6, 1888. They paid seven hundred fifty dollars to Brash. The defendant, Murrell, is not shown to have paid any valuable consideration for the land. Neither the appellant nor his vendors are shown to be purchasers for value without notice of the equitable rights of Simon established by the evidence in this case.

We think the judgment should be affirmed.

PARTNERSHIP IN LANDS, WHEN EXISTS: See generally notes to *Greene v. Greene*, 13 Am. Dec. 646-648; *McCormick's Appeal*, 98 Am. Dec. 197-201. As against creditors, the question is, whether the land has been bought with partnership funds and for partnership purposes: *Alkire v. Kahle*, 123 Ill. 496; 5 Am. St. Rep. 540; *Chandler v. Jessup*, 132 Ind. 351; *Wilhite v. Boulware*, 88 Ky. 169. As between the partners, the question is one of intention, which may be manifested by acts and declarations, and established by parol evidence: *Collner v. Greig*, 137 Pa. St. 606; 21 Am. St. Rep. 899; *Warriner v. Mitchell*, 128 Pa. St. 153. So, when a partnership is formed under a parol agreement, it may be shown that its property consists of lands: *Allison v. Perry*, 130 Ill. 9.

PARTNERSHIP. — REAL ESTATE OF FIRM IS TREATED IN EQUITY AS PERSONALTY: *Rovelsky v. Brown*, 92 Ala. 522; 25 Am. St. Rep. 83; *Bates v. Babcock*, 95 Cal. 479; 29 Am. St. Rep. 133.

PAROL PARTITION OF LANDS, WHEN FOLLOWED BY POSSESSION IN SEVERALTY, is valid in many states: See authorities cited in the note to *Tomlin v. Hilyard*, 92 Am. Dec. 122; *Nave v. Smith*, 95 Mo. 596; 6 Am. St. Rep. 79; *Warren v. Fredericks*, 76 Tex. 647; *Kennemore v. Kennemore*, 26 S. C. 251; *Meacham v. Meacham*, 91 Tenn. 532. A late case holding the contrary doctrine is *Fort v. Allen*, 110 N. C. 183.

VENDOR AND PURCHASER — NOTICE. — Whatever will put a purchaser on inquiry and lead to knowledge is notice: *Rorer Iron Co. v. Trout*, 83 Va. 397; 5 Am. St. Rep. 285; *Woodall v. Kelly*, 85 Ala. 368; 7 Am. St. Rep. 57; *Smith v. Schaeigerer*, 129 Ind. 363; *Jackson etc. R. R. Co. v. Davison*, 65 Mich. 416.

DAVIS v. LANING.

[35 TEXAS, 32.]

CIVIL DEATH. — STATUTES REGULATING TIME WHEN DESCENT IS CAST, and fixing such time as the death of the ancestor, refer to his actual physical death, and not to any civil death resulting from his conviction and imprisonment for crime.

CIVIL DEATH. — ONE SENTENCED TO IMPRISONMENT FOR LIFE in the penitentiary as a punishment for crime is not civilly dead, nor can anyone recover property as his heir at law while he remains alive.

W. S. Maxwell, for the plaintiff in error.

MARR, J., Section A. This action was brought by the plaintiffs in error against the defendant in error to try title to and to recover a certain tract of land in Llano County, Texas. They claim the land as heirs at law of their son, one C. C. Davis, who was duly convicted in the district court of the above-named county, and sentenced to the state penitentiary for the term of his natural life. They contend that this conviction rendered C. C. Davis *civiliter mortuus*, and cast descent upon his heirs. He is, however, still alive in fact, and undergoing the life sentence in the penitentiary. The land belonged to him at the time of his conviction, and he was and is an unmarried man and has no children.

The defendant claims title to the land under a purchase at an execution sale upon a judgment of a justice court, which was rendered against C. C. Davis in a suit instituted against him after his conviction and incarceration in the penitentiary. It is alleged, however, in the petition, that this judgment and execution sale are null and void for the want of service of process upon the defendant in said suit.

Upon a foregoing state of the case the court below sustained a general demurrer to the petition of the plaintiffs, and dismissed their suit.

The plaintiffs seek to recover the land in their own right, and not for, or in behalf of C. C. Davis. They have sued out a writ of error, and have assigned as error the action of the court in sustaining the demurrer.

The question presented for our determination is one of first impression in this state, if it can be deemed a question at all, in view of the bill of rights, and our statutory provisions which relate to descent and distribution, administration and wills, and the probate thereof, etc.

Attainders, outlawry, deprivation of property except by due

process of law, and corruption of blood, or forfeiture of estate as a result of conviction of crime, are expressly prohibited by the organic law: Const., art 1, secs. 16, 19-21. Section twenty-one declares that, "no conviction shall work a corruption of blood or forfeiture of estate; and the estate of those who destroy their own lives shall descend or vest as in case of natural death." This provision is invoked by the plaintiffs in error, but it aids their case no further than a declaration that a convict may either inherit himself, or transmit inheritance. It does not attempt to determine at what time the descent of his estate shall be cast, but excludes this idea by the express regulation concerning the estates of suicides. In any event, it most certainly does not declare that the estates of convicted felons shall upon conviction, "descend or vest as in case of natural death." In short, we find nothing in the constitution to support the position of the plaintiffs, but much that might warrant an opposite conclusion.

It is not necessary, however, for us to determine whether, under the provisions of the constitution before cited, it would be within the power of the legislature to establish a rule of descent, as contended for by the plaintiffs, in cases like the present, for the plain reason that, so far as we are aware, the legislature has not yet enacted any such law. The statutes before mentioned are too numerous to be quoted, but an examination of their provisions will, as we think, inevitably lead to the conviction that whenever these statutory enactments upon the subject aforesaid speak of death, they mean the natural death of the person whose estate or testament is involved. Analogous statutes were so construed in similar cases by the court of appeals of New York, and the supreme court of Ohio. As our statutes regulate the time when descent is cast, viz., when the ancestor is in fact dead, we are not, therefore, relegated to the common law for a rule of decision, although under that law even an attainted convict was not divested of the title to his lands until after office found, but could dispose of them by will, subject to a forfeiture at the instance of the crown, etc: *Avery v. Everett*, 110 N. Y. 317; 6 Am. St. Rep. 368.

In the case just cited it was held that although a statute of that state declared that "life convicts should thereafter be deemed civilly dead," still, in case of a devise of land to such a convict, with directions that if he should die without issue the property shall vest in another, the land "does not so vest

upon his civil death." This decision was not rested upon the intention of the testator, but upon the broader ground that the conviction had not divested the convict of his title to the land. We have no such statute as the one above quoted, and for stronger reasons, therefore, would the principle just announced apply to the case in hand.

The supreme court of Ohio held, that "a man sentenced to imprisonment for life in the penitentiary, — imprisonment for crime, — is not civilly dead, and letters of administration cannot be granted upon his estate": *Frazer v. Fulcher*, 17 Ohio, 260. The learned judge who delivered the opinion observed that, "we know that in England there are cases in which a man, although in full life, is said to be civilly dead, but I had not learned, until this case was brought before us, that there was but one kind of death known to our laws." This, perhaps, about expresses the state of our own laws upon the subject. It has been decided that convicted felons may be sued, and may dispose of their property by will or deed, etc.; and it would seem that under the terms of our own statutes there exists no valid objection to a convict devising his lands, if otherwise possessed of the statutory qualifications essential to testamentary capacity: *Avery v. Everett*, 110 N. Y. 317; 6 Am. St. Rep. 368; *Rankin v. Rankin*, 6 T. B. Mon. 531; 17 Am. Dec. 161; Rev. Stats., art. 4857; see, also, art. 3222.

If he can be sued and his property seized by his creditors after conviction, as has been held; if he can dispose of it by will, to vest as he shall direct after his death, then clearly he is neither dead in fact nor in law, and *a fortiori* there can be no descent of his estate to "his heirs at law," under such circumstances.

We do not deem it important to pursue the inquiry to any greater extent. We think that we have said sufficient to indicate our views of the point at issue.

The subject, however, in many of its phases, is exhaustively discussed in the case of *Avery v. Everett*, 110 N. Y. 317, 6 Am. St. Rep. 368, and in a learned note to that decision, as reported in 6 Am. St. Rep. 379. See, also, 2 Lawson's Rights, Remedies, and Practice, sec. 899.

We have no statute, like that in England, providing for the appointment of a trustee or guardian of the estate of a life-convict. That is a matter for the determination of the legislative department. We conclude that the conviction and sentence of C. C. Davis did not effect a devolution of the title

to his land upon the plaintiffs in this case as his heirs at law, and that the maxim *nemo est hæres viventis* applies.

The judgment should be affirmed.

CIVIL DEATH: See generally note to *Avery v. Everett*, 6 Am. St. Rep. 379. It has been held by the supreme court of New York that a person civilly dead is not a "decedent" within the purview of the provisions of the Code of Civil Procedure in reference to estates on which letters of administration may be granted: *In re Zeph's Estate*, 50 Hun, 523. In Florida a person imprisoned in the penitentiary for life, is not civilly dead, may sue in his own name: *Willingham v. King*, 23 Fla. 478.

GULF, COLORADO, AND SANTA FE RAILWAY COMPANY v. LOONEY.

[85 TEXAS, 158.]

RAILWAY CORPORATIONS. — A TICKET LIMITING THE TIME WITHIN WHICH A PASSENGER is entitled to ride from one point to another is subject to the implied condition that the train shall make the passage within that time, or, in other words, that the corporation shall perform its obligation. If the passenger is to be transported over connecting lines but is delayed upon one of them without his fault so that he cannot finish his journey within the time designated, he does not lose his right to be carried to his destination, and if ejected from his train by a carrier, though not the one by whose fault his delay occurred, may recover damages therefor, provided his ticket was evidence of a joint undertaking on the part of all the lines of railway over which it was necessary for him to travel.

RAILWAY CORPORATIONS. — TICKET OVER CONNECTING LINES DOES NOT EVIDENCE A JOINT CONTRACT by them when it consists of coupons each entitling the passenger to transportation over the line of the carriers designated therein, and the whole is sold by one of them acting as the agent of the others so far as their lines are concerned. Each coupon is the separate contract of the connecting carrier to whose line it applies.

RAILWAY CORPORATIONS. — IF THE TIME WITHIN WHICH A PASSENGER MAY USE A COUPON TICKET OVER CONNECTING LINES IS LIMITED therein, and each of the coupons is the separate contract of the line to which it relates, it need not be honored unless presented within the time designated, though the passenger commences his journey at the earliest time possible and his delay is owing to the fault of one of the connecting lines. His remedy is against the line through whose fault he was not transported in time.

RAILWAY CORPORATIONS. — PASSENGER TICKETS LIMITED AS TO THE TIME WITHIN WHICH THEY MAY BE USED MUST BE PRESENTED before the expiration of such time, and if the ticket consists of several coupons, binding upon separate carriers, each coupon must be presented to the carrier named therein before the expiration of the time limited, and if presented after that time, need not be honored, though the other coupons

had been presented within due time to the carriers bound by them, and through the fault of one of such carriers the passenger had been delayed so that it became impossible to present his last coupon within the time stipulated.

J. W. Terry and Alexander and Clark, for the appellant.

Ford and Ford, for the appellee.

GARRETT, P. J., Section B. This action was brought by Isaac Looney against the Gulf, Colorado, and Santa Fe Railway Company to recover damages, because, as alleged, the defendant's conductor unlawfully ejected the plaintiff from defendant's cars while he was traveling thereon as a passenger.

The petition alleged, that on August 6, 1888, at Birmingham, Alabama, plaintiff purchased a limited ticket from the Louisville and Nashville Railway Company, which entitled plaintiff to transportation from said city of Birmingham, Alabama, to McGregor, Texas, and thence on the line of the defendant's railway to Cameron, Texas; that in issuing said ticket the Louisville and Nashville Railway Company acted for itself and as the agent of the defendant company; that the ticket was purchased August 6, 1888, and was limited to August 9; that plaintiff left Birmingham on the day the ticket was issued, in ample and sufficient time to have reached his home in Cameron before the limit expired; but while traveling with all possible dispatch, and while on the cars of one of the connecting lines of defendant, at Belden, Texas, he was unavoidably detained, without fault on his part, about eighteen or twenty hours, and did not reach the said town of McGregor until the morning of August 10; that plaintiff, on August 10, entered the first passenger cars of defendant bound for Cameron after his arrival at McGregor; that the defendant company recognized the validity of said ticket, but refused to carry plaintiff thereon, claiming it had expired, and compelled plaintiff to pay the sum of one dollar to be carried to Temple, on defendant's line of road; that after passing Temple, defendant did, without any lawful cause, with force and violence, eject plaintiff from its cars, and turn him off at a place other than a usual stopping place, in the open prairie and hot sun, and declined to transport plaintiff further. Whereby, to plaintiff's great injury and mortification, he has been damaged, including lost time and additional price paid for ticket, in the sum of two thousand five hundred ten dollars, for which amount he prays judgment.

Defendant's answer embraced general and special exceptions, general denial, and a special plea, that at the time plaintiff first reached defendant's line of railway the time within which his limited excursion ticket was to be used had expired, of which fact plaintiff was notified by defendant's conductor; that plaintiff, upon demand of the latter, paid his fare from McGregor to Temple, Texas, the last-named point being the divisional terminus of defendant's line of railway, where a change of conductors was made; that after leaving Temple on the route to Cameron, defendant's second conductor demanded of plaintiff his fare or ticket from Temple to Cameron, and plaintiff refused to produce either; that plaintiff courted a forcible eviction of himself from defendant's train, as a basis for a damage suit against defendant. Defendant says its conductor ejected plaintiff without force, solely because he utterly refused to pay his fare or produce a valid ticket.

Defendant's demurrers were overruled by the court, to which defendant excepted.

Trial before a jury resulted in a verdict and judgment for the sum of four hundred thirty-four dollars.

Appellant's first and second assignments of error are based upon the action of the court in overruling its several demurrers, that the facts alleged in the petition showed that, "when plaintiff was ejected it was in consequence of his insisting upon riding upon an expired ticket, and if plaintiff had any cause of action it was clearly not against defendant"; and in overruling defendant's special exceptions, "because the allegation as to delay or default being the express act of the carrier other than the defendant, and the same not occurring upon defendant's line, defendant is not liable."

From the allegations in the plaintiff's petition it would seem that the agent of the Louisville and Nashville Railway Company at Birmingham, Alabama, sold the plaintiff a ticket, which entitled him to through passage from Birmingham to Cameron, Texas; and that in doing so he acted also as the agent of the defendant. It does not appear that the ticket was composed of the separate tickets or coupons of each of the connecting lines, or that the ticket was limited in any other manner than as to the time within which it should be used. Looking only to the petition, as we must in the disposition of the demurrers, the ticket appears to have been the joint contract of the Louisville and Nashville Railway Com-

pany and its connecting lines, including that of the defendant, to transport the plaintiff from Birmingham, Alabama, to Cameron, Texas, with a limitation only as to the time within which it should be done. Such a limitation may be made when reasonable, and the purchaser of the ticket must use it within the time stipulated; but it is subject to the implied condition that the train shall make the passage within the time limited, and that the company shall upon its part perform its obligation: 2 Wood's Railway Law, 1398, 1400, 1402.

It appears from the petition that the failure of the plaintiff to reach McGregor before the expiration of the ticket was owing to the fault of one of the connecting lines; that the plaintiff commenced his journey immediately after the purchase of the ticket on August 6, but was detained at Belden, on a connecting line, which failed and refused to move its train for eighteen or twenty hours; and that but for such delay plaintiff would have reached McGregor in time to take defendant's train on the 9th of August, before the expiration of the ticket. Since it appears from the petition that the ticket was the joint undertaking, or evidence of such undertaking, on the part of all the lines of railway, the defendant would be responsible for the default of the connecting line causing the delay, to the extent at least that it was bound to honor the ticket when presented to it at McGregor for passage from McGregor to Cameron. A joint undertaking having been shown by the petition of all the connecting lines to transport the plaintiff from Birmingham, Alabama, to Cameron, Texas, the limitation of the time in the ticket also applied to the time within which the journey should be commenced at Birmingham; and the plaintiff having commenced his journey within the time prescribed, and continued the same, without a stop-over, to McGregor, he was entitled to be transported by defendant from McGregor to Cameron, notwithstanding the limitation to his ticket had expired when he reached McGregor: 2 Wood's Railway Law, 1397, 1398; *Lundy v. Central Pac. R. R. Co.*, 66 Cal. 191; 56 Am. Rep. 100. Since the averments of the plaintiff's petition show a through contract for passage, as we think, there was no error in overruling the defendant's demurrers.

But the facts as developed upon the trial of the case show that plaintiff's ticket was a coupon ticket, the unused portion of which was as follows:—

“Issued by Louisville and Nashville Railway Company.

Good for one passage of the class designated, to the point on Gulf, Colorado, and Santa Fe Railway Company indicated by punch marks in check attached, when stamped by company agent, subject to the following contract. It is understood and agreed between the purchaser of this ticket and all the companies named in it and its coupons, as follows: —

“1. That in selling this ticket and coupons over connecting lines the Louisville and Nashville Railway Company acts only as agent, and is not responsible beyond its own line.

“2. That baggage liability is limited to wearing apparel, not exceeding one hundred dollars in value.

“3. That no stop-over will be allowed unless permitted by the local regulations of the various lines.

“4. That if this ticket and coupons are punched to indicate destination only, they are good until used.

“5. That if the ticket and coupons are sold at a reduced rate and punched to denote that they are limited, they are not good after the date so cancelled in the margin of this contract, and that if more than one date is cancelled they are void.

“6. That if no punch marks are used to indicate ‘class,’ then this ticket and coupons are good for first-class passage; but when punched to denote second class, they entitle the holder only to the privileges usually accorded to second-class passengers.

“7. This ticket and coupons are void if they show any alteration or erasure, or if more than one station is designated as the terminal point; and that the coupons are void if detached.

“8. That none of the companies named in this ticket or coupons will be held liable for damages on account of any statement not in accordance with this contract made by any employee or employees of said companies.

“9. That it is especially agreed and understood, that no agent or employee of any of the companies named in this ticket or coupons has any power to alter, modify, or waive in any manner any of the conditions named in this contract.

“10. That the right exists to declare this ticket or either of the coupons forfeited for violation of either of the companies (?) [conditions] named in this ticket or coupons; the right of forfeiture being a continuous one.

“C. P. ATMORE,
“General Passenger and ticket Agent.”

In the margin of the contract "August 9, 1888," is punched indicating August 9, 1888, as the cancelled date referred to in the fifth clause of the ticket. Its only coupon attached reads, "Issued by Louisville and Nashville Railway Company on account of Gulf, Colorado, and Santa Fe Railway Company, McGregor to point indicated by punched mark"; Cameron being the point indicated by punched mark. "Not good if detached." In one corner of the coupon are the letters, "Limited when punched," printed around a half-circle, and the half-circle is punched out with the letter L. The coupon is so punched in another corner to denote that it entitles the holder to first-class passage. The balance of the coupons were detached by the conductors of connecting lines. The ticket was by way of Louisville and Nashville, the "Cotton Belt," or St. Louis, Arkansas, and Texas, and the Gulf, Colorado, and Santa Fe Railway lines to Cameron, Texas.

Plaintiff bought the ticket at Birmingham, Alabama, from the agent of the Louisville and Nashville Railway Company, on August 6th. He called for the cheapest ticket. He commenced his journey at once, and did not stop over *en route*, but was detained on the Cotton Belt by a wreck, and had to stop over there, without fault on his part, eighteen or twenty hours. But for this delay he would have reached McGregor in time to take the defendant's train bound for Cameron on August 9th. He reached McGregor on August 10th, and took the first train leaving for Cameron over defendant's road. The conductor refused to honor the coupon because it had expired, and plaintiff paid him the regular local fare as far as Temple. After passing Temple plaintiff was ejected by another conductor because he failed to produce a ticket other than the expired coupon, or pay the fare.

The court in its charge to the jury held the defendant responsible for the act or omission of the connecting line, and instructed the jury, in substance, to find for the plaintiff if he failed to make the connection at McGregor, from no fault of his own, but by reason of the act or omission of the defendant or either of the connecting lines. Defendant requested the following charge, the refusal of which has also been assigned as error: "You are instructed that the evidence, without contradiction, showing that plaintiff's ticket was a limited ticket, and that the period of limitation had expired when plaintiff first boarded defendant's train on its line of railway, the conductor was justified in refusing to recognize the ex-

pired ticket; and upon refusal of plaintiff to pay fare or produce a valid ticket, the conductor was justified in ejecting plaintiff, using no more force than was necessary."

It is further contended that the verdict of the jury is not supported by the evidence in the case, to the effect that, "the ticket upon its face expresses that in issuing the same with coupons over connecting lines, the Louisville and Nashville Railway acts only as agent, and is not responsible beyond its own lines, which stipulation in the ticket negatives the existence of any partnership or joint interest between the various companies over whose roads the different coupons read, and the evidence fails to show that there was any partnership or joint interest. The ticket upon its face, in connection with the coupons, shows in legal effect that if the defendant company was in any respect connected with or bound thereby, that it was a contract on the part of defendant company to transport the plaintiff from McGregor to Cameron, provided the ticket was presented to it for passage on or before the ninth day of August, 1888; and the evidence shows that the plaintiff failed to present said ticket for passage to the defendant within said time; and under the contract evidenced by the ticket, in connection with all the testimony in the case, the defendant not being liable for the defaults or negligence of other lines which may have prevented the plaintiff from presenting his ticket in the required time to the defendant, the verdict is entirely without evidence to support it, and should have been for the defendant"; and that the court should have charged the jury to return a verdict in favor of the defendant.

As the ticket upon which the plaintiff traveled in this case contained the stipulation "that in selling this ticket and coupons over connecting lines, the Louisville and Nashville Railway Company acts only as agent, and is not responsible beyond its own lines," we are relieved of the difficulty presented in the consideration of a case where separate coupon tickets are sold without such limitation. But Mr. Hutchinson, in his work on carriers, section 152, says it is, "well settled that one passenger carrier may sell his own and at the same time the tickets of connecting carriers, entitling the purchaser to through transportation to his destination over all the lines, and may receive the fare for the whole distance without becoming responsible for the passenger's carriage beyond his own line; and, in fact, where nothing else appears in the

transaction, this will be the legal construction put upon it." Each coupon is the separate contract, voucher, or token of the respective connecting carriers, and the selling carrier is the agent of the several lines in selling them: *Knight v. Portland etc. R. R. Co.*, 56 Me. 234; 96 Am. Dec. 449; *Milnor v. New York etc. R. R. Co.*, 53 N. Y. 363; *Hartan v. Eastern R. R. Co.*, 114 Mass. 44; *Ellsworth v. Tarrt*, 26 Ala. 733; 62 Am. Dec. 749; *Hood v. New York etc. R. R. Co.*, 22 Conn. 1. The coupons are not the contract of the first or selling carrier; but it sells them as the agent of the several connecting carriers.

When, as in the present case, it is expressly stipulated that the selling carrier acts as the agent of the connecting carriers, and will not be responsible beyond its own line, each coupon becomes the separate contract of the line for which it is issued; and the ticket does not imply a joint obligation resting on each of the companies. A carrier may limit its liability to its own line: *Gulf etc. R'y Co. v. Baird*, 75 Tex. 263; and our supreme court sees no distinction between carriers of freight and of passengers: *Harris v. Howe*, 74 Tex. 534; 15 Am. St. Rep. 862.

It appears from the evidence that the limitation of the ticket to four days was reasonable, and that the plaintiff would have easily reached McGregor in time for the defendant's train on August 9th, but for the delay on the line of the Cotton Belt. Being reasonable, the limitation of the ticket was binding upon the plaintiff, and the coupon evidencing the plaintiff's right to be carried from McGregor to Cameron over defendant's line was defendant's contract, and entitled the plaintiff to be transported if he presented himself within time; and defendant should not be held liable for the default of its connecting line to have the plaintiff there in time: *Mosher v. St. Louis etc. R'y Co.*, 127 U. S. 393. Plaintiff has a right of action against the Cotton Belt company for its failure to transport him to McGregor within time; but his coupon for transportation over defendant's line having expired by limitation, the defendant was not bound to carry him, because it was no fault of plaintiff that he did not reach there in time. Neither was it the fault of the defendant.

Appellee relies upon the fact that the journey was commenced at Birmingham within the time to which the ticket was limited to compel the defendant to recognize its coupon, though presented after the expiration of the limit, and has

cited as authority for his position, 4 Lawson's Rights, Remedies, and Practice, page 3235, and the cases cited in support of the text, which is: "When a limited ticket is issued 'not good for passage after' a certain number of days from its date, or to be 'used' by a certain day, the passenger need not have completed his journey by that date. It is sufficient that he has commenced it": Citing *Lundy v. Central Pac. R. R. Co.*, 66 Cal. 191; 56 Am. Rep. 100; *Auerbach v. New York etc. R. R. Co.*, 89 N. Y. 281; 42 Am. Rep. 290; *Evans v. St. Louis etc. R'y Co.*, 11 Mo. App. 463.

In *Auerbach v. New York etc. R. R. Co.*, 89 N. Y. 281, 42 Am. Rep. 290, the plaintiff had purchased a ticket from St. Louis over several railways mentioned in coupons annexed to the ticket, to the city of New York. When ejected from defendant's cars he had commenced his journey upon the last coupon before its expiration, and had not completed it when the time expired. It was held that the acceptance of the coupon by the conductor before midnight of the last day was in time, although the journey could not be completed until afterward. This case is not in point, and applies only to a continuous trip. The case in Missouri Appeals, *Evans v. St. Louis etc. R'y Co.*, 11 Mo. App. 463, is not accessible to us.

Lundy v. Central Pac. R. R. Co., 66 Cal. 191, 56 Am. Rep. 100, would at first seem to be in point, as the ticket was a coupon ticket issued by the Union Pacific Railway over its line and that of defendant, and the court said: "In our view it was only required of plaintiff that he present himself at the cars of the Union Pacific Railway Company or of the defendant, and take passage at any time within nine days from the twelfth day of March, 1874." Plaintiff's time had expired when he presented the coupon to defendant's conductor. But an examination of the case will show that the liability of the Union Pacific was not limited, nor that of the defendant, by the terms of the ticket; and a verbal agreement was shown between the passenger agents of the companies to honor each other's tickets. It was put on the ground that a contract was made by authority of the defendant by the Union Pacific Railway Company for carrying the plaintiff through from Omaha, on the line of the Union Pacific, to San Francisco, on the line of the defendant.

We are of the opinion that the defendant made no contract except to carry the plaintiff from McGregor to Cameron, and only then in case he presented himself for carriage at the de-

defendant's cars for that purpose within the time fixed in the ticket; and that the defendant was not bound to carry out said contract after the limited time on account of the failure of its connecting line to perform its obligation to expeditiously carry the plaintiff and have him at McGregor before the expiration of his ticket.

Consideration of the remaining assignments of error is unnecessary.

For the error of the court herein indicated, we conclude that the judgment of the court below should be reversed and the cause remanded.

RAILROAD COMPANIES — LIMITED TICKETS — CONNECTING CARRIERS. — The holder of a through ticket limited in time should inform himself, whether or not he can make the continuous passage contemplated by his ticket on any particular train, and if he enters upon a train which only covers a part of the journey, and is permitted to remain upon the ticket, that fact does not entitle him to claim a passage for the remaining distance upon the through train, after the limit of the ticket has expired: *Gulf etc. R'y Co. v. Henry*, 84 Tex. 678. But where a ticket over connecting lines is limited to a specified number of days, the last day falling on Sunday, and the last line runs no train on that day, the passenger is entitled to passage on the next day: *Little Rock etc. R'y Co. v. Dean*, 43 Ark. 529; 51 Am. Rep. 584. A carrier who sells through tickets to places beyond his own line, in pursuance of an agreement with connecting carriers is liable for damages to persons detained on their journey through the fault of such connecting carriers: *Carter v. Peck*, 4 Sneed, 203; 67 Am. Dec. 604.

HARRIS v. TENNEY.

[85 TEXAS, 254.]

RIGHT OF STOPPAGE IN TRANSITU CONTINUES not only while the goods are in transit, but until they have reached their destination and been delivered into the actual or constructive possession of the consignee.

STOPPAGE IN TRANSITU. — GOODS WHICH HAVE BEEN SHIPPED TO THE PURCHASER and which are on drays in process of being carried from a railway depot to the store of the vendee, are still subject to the right of stoppage *in transitu*. The placing of the goods on drays, though done at the instance of the purchaser, is not such a delivery as defeats the right of stoppage *in transitu*.

ATTACHMENT OF GOODS WHILE IN TRANSIT does not impair the vendor's right of stoppage *in transitu*.

STOPPAGE IN TRANSITU. — DELIVERY TO A CARRIER UNDER AN ORDER OF THE CONSIGNEE is not such a constructive delivery to him as will interfere with the consignor's right of stoppage *in transitu*.

STOPPAGE IN TRANSITU — DELIVERY TO AN AGENT OF ATTACHING CREDITOR. If the purchaser of goods on credit, has become insolvent and the

goods have not been delivered to him but are in the possession of a carrier, an attaching creditor, or a person acting for such creditor, will not be allowed to become the agent or representative of the purchaser for the purpose of procuring or accepting delivery of such goods and thereby cutting off the right of the vendor to stop them in transit. If the vendor loses this right, it must be by the usual course of events or such as occurs without combination, connivance or co-operation of the purchaser and the attaching creditor.

STOPPAGE IN TRANSITU. — DELIVERY OF GOODS AT A STOREHOUSE FORMERLY OCCUPIED BY THE PURCHASER but at the time in the possession of a sheriff by virtue of seizure under attachment, is not a delivery to the purchaser, and a levy thereafter made cannot affect the vendor's right of stoppage *in transitu*.

SHERIFF REFUSING TO RECOGNIZE A VENDOR'S RIGHT OF STOPPAGE IN TRANSITU and thereafter selling goods which are subject to that right is answerable for their value to such vendor.

PRACTICE. — PERSONS CLAIMING PROPERTY WHICH HAS BEEN SEIZED UNDER ATTACHMENT ARE NOT COMPELLED TO INTERVENE IN ATTACHMENT SUIT and try their right of property there, but may maintain an independent action to recover their value.

PRACTICE — PARTIES. — PURCHASERS OF PROPERTY ON CREDIT ARE NOT NECESSARY PARTIES to an action by their creditor against a sheriff who seizes and sells such property in defiance of his right of stoppage *in transitu*. Such an action does not affect the rights of the purchaser, and the creditor, if successful, merely secures possession of the property or of its value to be held subject to his lien and to the right of the purchaser to its possession upon discharging such lien.

Clark, Dyer and Bolinger, for the appellants.

Robertson and Davis, for the appellees.

COLLARD, J., Section A. This suit was brought June 27, 1889, by the appellees, Walter H. Tenny & Co., a firm of merchants in Boston, Massachusetts, against W. T. Harris, sheriff of McLennan County, and the Waco State Bank, to establish their right to the possession of certain goods, or the value thereof, which had been seized by the sheriff at the instance of the bank, and sold and converted to the use of the bank. The cause of action of plaintiffs is predicated upon their alleged seller's lien upon the goods, or right of stoppage *in transitu*. The value of the goods itemized in the account was five hundred sixty-three dollars and sixty-seven cents, but plaintiffs sustained their right of recovery to only the last two items of the account, amounting to three hundred fifty-three dollars and seventeen cents, and it is only of these that we are concerned, and will only speak of them. Defendants have appealed.

Plaintiffs sold the goods to the firm of Moser and Son, merchants in Waco, on a credit, and shipped them by rail to

Waco, the point of destination, for Moser and Son. They arrived in Waco by the Missouri, Kansas and Texas Railway, and were left in the depot. On the third day of October, 1888, Moser and Son were closed out by attachment, their business house, and all their goods therein, levied on by the sheriff, and taken into his possession. Moser and Son were then insolvent. On the 4th of October, 1888, the Waco State Bank sued out attachment against Moser and Son, on a debt of six thousand nine hundred ninety dollars and eighty-eight cents, and caused the sheriff to levy the same on the goods sold by plaintiffs to Moser and Son, — the goods involved in this suit.

The levy was made under the following circumstances: W. W. Seley, cashier of the bank, obtained from one of the firm of Moser and Son, October 4, 1888, a written order to the railway agent, directing the company to deliver the goods to the dray line in Waco, to be carried by the dray line to the store of Moser and Son, Moser giving Seley money to pay the freight (loaned by the bank, and afterward repaid by Moser and Son), requesting witness to present the order, pay the freight, receive possession of the goods, and have the dray line take the goods to the store of Moser and Son. Seley took Cook, a deputy sheriff, along with him to the depot, went to the depot, presented the order, paid the freight, and received possession of the goods from the railway company, "or rather," Seley says, "after paying said freight and presenting the order, the railway company authorized him or the dray line to take possession of said goods; and Cook, after paying said freight and presenting said order of Moser and Son, was requested by witness to see said goods loaded on the dray line for shipment up town to the store of Moser and Son, which Cook agreed to do." (Sheriff Harris had, prior to this, been to the depot and directed or informed the agent that he must not deliver the goods to Moser and Son, but to hold them.) Seley returned and directed the sheriff to go and levy on the goods for the bank.

Cook testified that he saw the goods loaded on the drays or floats, and was going along with them to the store, when Harris, while the goods were on their way to the store, before reaching it, levied the attachment on the goods; and again, after the goods reached the store, under direction of counsel for the bank, levied on the goods a second time. Cook was not acting officially; did not have the writ, and did not levy it.

Harris, testifying, says he is not certain when the goods were first levied on by him, his impression being that he made the levy when the goods were at the depot; but he is certain that he levied the writ after the arrival of the goods at the storehouse.

Seley testified that he acted as the agent of Moser and Son in receiving the goods. The bank advanced the money to Moser and Son to pay the freight on the goods, and Moser and Son repaid them. Seley also testified that when Moser gave him the order for the goods, Moser requested him to present the order to the agent of the railway, pay the freight, and receive the possession of the goods, and have the dray line take them to the store of Moser and Son.

The testimony does not show how long the goods had been at the depot before they were taken away. Harris says he learned that there were goods at the depot belonging to Moser and Son. He went to the depot to inquire if there were any goods there belonging to them, and learned the fact, and he then "informed the agent of the railway company that he must not deliver them to Moser and Son, and to hold them."

Moser testifying, says, that learning that the goods were at the depot, on October 4th he gave Seley an order for the same, requesting the company, or its agent, to deliver the goods to the dray line for Moser and Son. He also says, that a day or so after the levy, and while the goods were in his possession under the levy, council for plaintiffs claimed possession thereof, saying, "that they had a right to them; that they had not reached their destination of shipment and had not been delivered into the possession of said Moser and Son." Harris refused to deliver the possession of the goods, but sold them and applied the proceeds to the debt of the bank.

It was proved by W. S. Baker, who was representing other creditors of Moser and Son, that he and the agent of the parties he was representing saw the goods in the store within a day or so after the levy, and seeing that they were the goods of plaintiffs, he notified the sheriff of the claim of plaintiffs, stating the claim of right to stop the goods in transit, and told the sheriff he would be held responsible for them. After he had so notified the sheriff, plaintiffs employed attorneys other than witness, and they notified the sheriff, claimed the goods on the legal right of plaintiffs to

stop them in transit, and warned the sheriff that if he did not surrender the goods they would sue him for their value.

The second levy was made without releasing the first, but the court finds that the last levy is the basis of the sheriff's return. The court also finds, that, "the bank and its cashier knew, as did Moser and Son, while the above transactions were had, that Moser and Son were insolvent, and that they, bank and Moser and Son, endeavored to so manipulate the goods that they would not be subject to the right of stoppage *in transitu* should it be attempted."

The court also finds, that the goods at the depot were subject to the right of stoppage when the sheriff levied on them, and that, "the delivery order given by Moser and Son did not change the destination of the goods, which was at the place of business on Austin Street; and the payment of freight, and the acceptance of the order by the railway company did not end the *transitus*, or give the purchaser such possession of the goods as would defeat the right of plaintiffs.

The court also held, that the attempt by the debtor and the bank to defeat the rights of plaintiffs to take the goods in transit was a nullity, and did not have that effect.

Also, that the goods never reached the possession of Moser and Son; the sheriff was not their agent, but was acting in hostility to them; and the goods having been claimed while in his hands, he held them subject to plaintiffs' right of stoppage.

Appellants contend, by their first assignment of error, that the evidence shows that at the time the attachment was levied the goods had reached their final destination, and were in the actual and constructive possession of Moser and Son, and were therefore no longer subject to stoppage *in transitu* by appellees.

The seller of chattels has a lien upon them, and the right to hold them for the purchase price, so long as they are in his possession; and when they have been shipped for delivery to the debtor who has become insolvent, the right to stop them on the way, to recover possession, and subject them to the payment of such unpaid price. This right continues not only while the goods are in actual transit, but until they have reached their destination and are delivered into the actual or constructive possession of the consignee: *Halff v. Allyn*, 60 Tex. 279; *Chandler v. Fulton*, 10 Tex. 13; 60 Am. Dec. 188;

Jones on Liens, 800, et seq. 857, 862, et seq., and specially 902.

Appellants do not controvert the foregoing proposition, but they say, that in this case it is shown that the goods had reached their ultimate destination and had been duly delivered by the carrier into the possession of their agent before the levy of the writ.

We have seen what kind of delivery it was. The order from Moser and Son to the agent of the railway did not authorize the agent to deliver the goods to Seley, but to the dray line. It is true, he had instructions from Moser to receive possession, but he does not say he did, but rather the company authorized him or the float line to take possession. He did not then take possession, but requested Cook to see the goods loaded on the dray for shipment up town to the storehouse of Moser and Son. The railway company was evidently only delivering the goods to the dray line for shipment, as directed in the order. The goods were loaded on the drays or floats, and Cook went with them to the store. If the goods were levied on at the depot, as Harris is impressed to say, or while on their way to the store, as Cook testifies, we think they were still in transit: *Halff v. Allyn*, 60 Tex. 282. The attachment by creditors while in transit did not impair or defeat plaintiffs' right: *Allyn v. Willis*, 65 Tex. 66; Jones on Liens, 965, and authorities cited in note 3.

In *White v. Mitchell*, 38 Mich. 390, action of trover was sustained against the sheriff, who had attached goods in the hands of the local carrier before delivery to the purchaser. In another case, a local carrier, or transfer agent, who had general authority from the consignee to deliver all goods shipped to him, undertook to transfer goods (shipped by rail) from the depot to the consignee, but finding the store closed, placed the goods in a warehouse in the city, where they were levied on by attaching creditors; it was held, that there had been no actual or constructive delivery to consignee, and the seller's right of stoppage in transit was not lost when the attachment was levied: *Mason v. Wilson*, 43 Ark. 172.

In Ohio it was decided that the right of stoppage *in transitu* is terminated only when possession was voluntarily and actually transferred to the vendee or to his agent; and that the seizure while *in transitu* subjects the officer making it to suit for the value of the goods by the vendor: *Calahan v. Babcock*, .

21 Ohio. St. 292-294; 8 Am. Rep. 63. Where goods arrived at the depot, place of shipment, "and by agreement between the consignee and the carrier they were set aside by the latter in its depot, to be sold, and the proceeds used to pay past due freights" (the consignee did not receive the boxes and then turn them over, assign the bill of lading, or pay the freight), it was held that there was no delivery so as to interfere with the right of stoppage *in transitu*: *Mason etc. R. R. Co. v. Meador*, 65 Ga. 705.

Upon the arrival of goods, the car containing them was set out where, according to custom, they were to be taken out immediately by the consignees, or on failure, to pay two dollars a day demurrage, there being no agreement that the carrier was to hold the goods as warehouseman or agent. On the next day they were attached, and it was held that the consignor's right of stoppage *in transitu* had not terminated, and that the officer attaching was liable in an action of trover: *Inslee v. Lane*, 57 N. H. 454.

The delivery to the consignee or his agent must be complete: *Chicago etc. R. R. Co. v. Painter*, 15 Neb. 395. A delivery to a carrier by order of the consignee is not such a constructive delivery to the consignee as will interfere with the consignor's right of stoppage *in transitu*: *Jones on Liens*, 907-912.

We are of opinion that plaintiffs' right of stoppage *in transitu* was not at an end while the goods were at the depot or on the drays. They were still in course of transportation, and had not been delivered to the consignees in person, or to their agent. There is no testimony in the case that can be construed to make the railway company or the dray line agents of the consignees, nor does the evidence show that Seley ever received the goods into his possession, even if under the circumstances he was the agent of Moser and Son to receive possession for them. Had Moser and Son themselves intercepted the goods at the depot before the terminus of transit, and, without actually taking the goods into their possession, ordered their delivery to the local carrier for shipment to their store, the right of plaintiff would not have been interfered with while in the hands of such carrier.

But there is a question deeper than this, which will relieve the case of difficulty in relation to delivery or not to Seley. Was he the agent of Moser and Son, or rather, could he be under the circumstances? We think he was the agent of the

bank during the entire transaction. He was acting for the bank and for its benefit; he was its representative. We do not think the attaching creditor would be allowed to become the agent of the debtor, under the circumstances shown in this case, to deprive the seller of his lien, and to secure a superior and valuable right to himself. The principle involved is more than one of mere diligence to secure a debt. The means adopted, if successful, would work a palpable injustice to plaintiffs, which should not be perfected and affirmed by the courts. On the contrary, the courts should prevent the consummation of such a design. The bank could not, as was attempted in this case, by acting for itself and its debtor, extinguish or destroy the right of another that stood in the way of collecting its debt.

The conclusion arrived at by the court below, in our judgment, was correct, and should not be disturbed on this question. The law supposes that if the vendor loses his lien, or right of stoppage *in transitu*, it shall be by the usual course of events, or such as fall out without the combining, the connivance, and co-operation of the vendee and an attaching creditor.

The delivery of the goods at the storehouse formerly occupied by Moser and Son, but at the time in the possession of the sheriff by virtue of seizure under attachment, was no delivery, actual or constructive, to Moser and Son. They had no control over the house, and a second levy there put the bank in no better attitude than it was before. The first levy was not released, and the goods had not left the possession of the sheriff from the time of the first levy, whether made at the depot or *en route* on the drays. Moser and Son had never had possession of the goods in person or by agent, and plaintiffs' right was still in force.

While the goods were so in the possession of the sheriff, he was notified in a reasonable time by plaintiffs' attorney of their right and its nature (but it is quite evident to us that the sheriff, the bank, and Moser and Son knew of such right all the while), before any change had taken place in the relations of any of the parties to the goods, and that such right would be insisted on. He refused to recognize plaintiffs' right, and thereby became liable, with the bank, for the value of the goods.

Plaintiffs were not required to intervene in the attachment suit of the bank against Moser and Son in order to establish

their right of regaining possession of the goods or recovering their value. They might have done so, as was done in cases cited (*Halff v. Allyn*, 60 Tex. 279, and *Allyn v. Willis*, 65 Tex. 66), but they were not compelled to intervene, or to file bond and oath to try the right of property: *Lang v. Dougherty*, 74 Tex. 228.

We do not think Moser and Son were necessary parties defendant. Plaintiffs did not sue to recover their debt and foreclose their sellers' lien upon the goods, but to recover the value of the goods from a wrongdoer, who had converted them. Moser and Son had no interest in this contest. The right of stoppage *in transitu* is to recover the possession of the goods, and hold the same subject to the seller's lien; and if the goods have been converted by one in violation of this right, he would be liable for the value of the same; such value to be held upon recovery by the vendor, instead of and under the same right as the goods themselves.

The seller's right is not to rescind the sale, and rescission does not result from the enforcement of such right; its object is "to secure possession to the vendor to enable him to exercise his right as an unpaid vendor": *Allyn v. Willis*, 65 Tex. 66. After possession has been reclaimed, the seller holds the goods subject to his lien, and must ordinarily hold them to the expiration of the credit given, so as to deliver them to the purchaser upon payment of the purchase price: *Jones on Liens*, 862. If the time of credit expires without payment, he can then proceed to enforce his lien: *Jones on Liens*, 862-864. This being the character of the right and its object, there can be no necessity to make the debtor a party. If the suit is not only to recover possession, but to obtain judgment on the debt and foreclose the lien, the debtor would be a necessary party. This suit asks no such relief; it was brought purely upon the right of stoppage *in transitu*, the vendor being insolvent. Where the suit was against the carrier who, after notice, delivered the goods, the debtor, being joined as defendant, was dismissed because of insolvency, and judgment was rendered against the carrier, but there is no comment in the opinion on the fact: *Poole v. Houston etc. R'y Co.*, 58 Tex. 135. We are in no doubt of the correctness of the conclusion that Moser and Son were not necessary parties to this suit.

The foregoing discussion disposes of all the assignments of error adversely to appellant. The judgment of the lower court should be affirmed.

SALES — STOPPAGE IN TRANSITU, RIGHT OF. — The time at which the transit of goods is at an end, so as to defeat the right of stoppage, is discussed in the extended notes to *Sangslaff v. Stiz*, 60 Am. Rep. 51-57; and *Rucker v. Donovan*, 19 Am. Rep. 87-92. The general rule is that the goods remain subject to the right until they have come into the actual or constructive possession of the consignee: *Sawyer v. Joslin*, 20 Vt. 172; 49 Am. Dec. 768. At page 91 of the second of the above notes several cases are cited to the point that an attachment at the suit of a creditor of the vendee will not defeat the right: *Blum v. Marks*, 21 La. Ann. 268; 99 Am. Dec. 725; *Farrell v. Richmond etc. R. R. Co.*, 102 N. C. 390; 11 Am. St. Rep. 760. Goods in the hands of an agent of the vendee are subject to the right of stoppage, when they are in his hands merely for the purpose of being forwarded, and not for the purpose of safe custody by him: *Chandler v. Fulton*, 10 Tex. 2; 60 Am. Dec. 168. The exercise of the right does not rescind the contract of sale, it simply restores the vendor to his lien, by placing him in the same position as if he had never parted with his property: *Newhall v. Vargas*, 15 Me. 314; 33 Am. Dec. 617; *Patten's Appeal*, 45 Pa. St. 151; 84 Am. Dec. 479.

WESTERN UNION TELEGRAPH COMPANY v. WISDOM.

[85 TEXAS, 261.]

PLEADING — CONTRIBUTORY NEGLIGENCE. — If one sued for negligence does not plead contributory negligence, he has no right to have the question of such negligence submitted to the jury.

TELEGRAPH CORPORATIONS — CONTRIBUTORY NEGLIGENCE. — A telegraph corporation failing to deliver a message informing a father of the fatal illness of his child and requesting his immediate presence, cannot escape liability on the ground that the agent of the father who sent the message could, on learning that the father did not arrive on the next train, have gone to where he was and there informed him of the facts disclosed by the message and thereby have enabled the father to reach his child before its death.

Stemmons and Field, for the appellant.

Baldwin and Duncan, for the appellee.

COLLARD, J., Section A. Suit by C. H. Wisdom, appellee, against the Western Union Telegraph Company, for damages because of mental anguish, etc., resulting from the failure of the company to deliver the following telegram: —

“WHITEWRIGHT, TEXAS, 8-13, 1888.

“To C. H. WISDOM, Bonham, Texas: —

“Your child is not expected to live; come at once.

“W. H. BLANKS.”

Plaintiff, with his family, was living in the town of Bonham, Fannin County, and was keeping a restaurant. On the 11th of August, 1888, he took his wife and child to her father's,

about four miles from Whitewright, in Grayson County, Texas. The child, a little over a year old, had been sick with teething and whooping cough, but was thought to be improving. Whitewright is about fourteen miles from Bonham, connected by railway, and defendant operated a telegraph line between the two towns. It is about eighteen miles from Bonham to the house of plaintiff's father-in-law. On the 12th of August plaintiff returned to his business at Bonham, leaving his wife and child at her father's; but before leaving he made arrangements with W. H. Blanks, who lived with his wife's father, to notify him by telegram in case the child became dangerously ill, furnishing him with money to pay for the sending of the message. On the 13th of the month the child became dangerously ill, and Blanks went to Whitewright and delivered to defendant's agent the telegram set out, paying the charges for the same and for repeating it, and informing the agent of the circumstances and urgency of the message. He did this as the agent of plaintiff. This was done six or eight hours before the passenger train came in from Bonham, in ample time for the message to have been sent and delivered to plaintiff in Bonham, to enable him to come on the train. Blanks remained at Whitewright, around the depot, until the passenger train from Bonham arrived. Wisdom did not come, and he returned home.

About nine o'clock, A. M., on the 13th of the month, plaintiff, being in Bonham, called at defendant's telegraph office and asked for a telegram for himself, and was informed that none had come. He then told the agent the circumstances about the child being sick; that a telegram might come for him, and in case it did, where to deliver it, at his place of business next door to Naum's meat market; told him that he was running a restaurant there, and could be found there at any time. He could have been found there at any time. The passenger train left Bonham for Whitewright between twelve and one o'clock on the 13th, and there was another train the same evening going the same way about seven o'clock, reaching Bell's about eight o'clock, and plaintiff testified to his belief that there was a train going on to Whitewright about that time. The telegram was not delivered, and as a result thereof plaintiff was not present at the death of his child.

On the morning of the 14th, about eight or nine o'clock, Blanks arrived at Bonham, having ridden horseback from where the child was, and informed plaintiff that the child was

dead. They both started and arrived at the place where the child was about eleven or twelve o'clock. It was laid out and dressed for burial. It had died about one o'clock in the morning.

The trial of the case resulted in a verdict and judgment for plaintiff for eight hundred seventy-five dollars.

The defendant appealed, and has assigned one error, as follows: —

“The court erred in overruling this special charge as asked by defendant: That if they find and believe from the evidence that the train reaching Whitewright about four or five o'clock on the evening of the thirteenth day of August, 1888, was the only train which would reach Whitewright on that day, and that plaintiff's agent, Blanks, met said train and found that plaintiff was not on it, and that if Blanks had come on to Bonham that evening and notified plaintiff in time to have reached his child prior to its death, and did not do so, that plaintiff cannot recover any damages herein by reason of his not being present at the death of his said child.”

Defendant did not plead contributory negligence, and, if for no other reason, could not ask that the requested charge be given to the jury: *Brown v. Sullivan*, 71 Tex. 470.

But if contributory negligence had been pleaded, there was nothing in the case demanding such a charge. Blanks was only engaged to send the telegram; he fully obeyed his instructions, and was under no obligations to defendant or anyone else to do more. If defendant had performed its duty there would have been no injury. Both Blanks and the plaintiff had the right to rely upon the presumption that defendant would send and deliver a telegram with reasonable dispatch. Plaintiff was not in a position to do more than he had done, and certainly could not be held responsible for Blanks' failure to ride to him with the information. This telegram was not delivered until after plaintiff returned from the burial of his child, and only on his applying for it, though it had been received at the Bonham office in a few minutes after it was written.

We are of opinion that the judgment should be affirmed; and believing that this appeal was taken for delay only, upon suggestion of appellee, that it should be affirmed, with ten per cent damages.

Affirmed with damages.

TELEGRAPH COMPANIES ARE LIABLE FOR DELAY IN DELIVERY OF MESSAGES: See notes to *Birney v. Printing Tel. Co.*, 81 Am. Dec. 616; *Western Union Tel. Co. v. Cooper*, 10 Am. St. Rep. 778; *Western Union Tel. Co. v. Adams*, 75 Tex. 531; 16 Am. St. Rep. 920. The fact that a dispatch has been delayed before reaching the telegraph office is not competent to prove contributory negligence where a company is charged with negligence in its transmission after it has been received: *Western Union Tel. Co. v. Rosentreter*, 80 Tex. 406.

FREIBERG v. WALZEM.

[85 TEXAS, 264.]

A HOMESTEAD IS NOT SUBJECT TO A JUDGMENT LIEN unless such lien existed before the homestead right was acquired.

HOMESTEAD EXEMPTION. — THE PROCEEDS OF A VOLUNTARY SALE OF A HOMESTEAD are not exempt from execution though the sale was made with the intention of purchasing another homestead with the proceeds.

A HOMESTEAD IS NOT SUBJECT TO THE LIEN OF A JUDGMENT AGAINST ITS OWNER EXISTING BEFORE ITS ACQUISITION if, at and before such acquisition, the debtor was occupying the property as his home and he purchased it as a home for himself and his family. As the lien cannot attach until the property vests in the debtor, and as at the moment it so vested it became his homestead, there was no intervening period in which the lien could take effect.

C. K. Breneman, and Upson and Bergstrom, for the appellants.

J. M. Taylor and C. L. Wurzbach, for the appellee.

MARR, J., Section A. This suit was instituted by the appellants, Freiberg, Klein & Co., against the appellee, Andrew Walzem, in the district court of Bexar County, Texas, on the tenth day of June, 1889, to foreclose a judgment lien for the sum of sixteen hundred seventy-four dollars and ninetee cents upon property owned by defendant, and acquired by him after an abstract of the judgment against him had been filed in the county where the property is situated. Defendant alleged that he had acquired the property for the purpose of a home for himself and family, and immediately used and occupied the same as a home. The cause was tried October 12, 1889, without a jury, and judgment rendered for defendant, from which judgment plaintiffs appealed to this court, and assign the following error: —

“The court erred in finding for the appellee, Andrew Walzem, against the lien claimed by appellants, on the ground that the property described in plaintiffs’ petition, upon which the judgment lien is claimed and sought to be foreclosed, was the homestead of appellee Walzem, in this, that the facts

show that appellants Freiberg, Klein & Co.'s judgment was of record in Bexar County before and at the time appellee Walzem acquired title to the property set out in appellants' petition, and therefore appellants' lien attached to the property ahead of and was and is superior to appellee's homestead claim therein."

The land in dispute is a house and lot "on Avenue D and Seventh Street, in the city of San Antonio, acquired by appellee by deed from Fritz Schreiner, dated March 23, 1889."

The abstract of the plaintiffs' judgment was duly recorded and indexed in the proper records of Bexar County on the fifteenth day of March, 1886.

The appellee, Walzem, proved, "that he was at the institution of this suit, and had been for several years prior thereto, a married man and the head of a family, consisting of himself, his wife, and one child; that on the nineteenth day of April, 1886, he purchased the lot 14, in block 36, on Avenue C, in the city of San Antonio, with the proceeds of the sale of his former homestead, and built a house on it, and lived therein, and occupied it with his family continuously for more than three years as their homestead; that on the nineteenth day of March, A. D. 1889, defendant and his wife sold their said Avenue C homestead to Leopold M. Michael for three thousand dollars, with the intention of investing the said money in another homestead; that on the twenty-third day of March, A. D. 1889, defendant purchased from Fritz Schreiner the house and lot on the corner of Avenue D and Seventh Street, in the city of San Antonio, with the intention and for the purpose of making it his homestead, and paid therefor the three thousand dollars realized by him as aforesaid from his said Avenue C homestead; that defendant had, a short time prior to the sale of his Avenue C homestead, temporarily rented it, and was renting and occupying the said house and lot on Avenue D (with the intention of purchasing the same and making it his homestead whenever he sold his Avenue C homestead) at the time he purchased it from the said Fritz Schreiner, and is now occupying and using the said house and lot on Avenue D, with his family, as his homestead, and that he does not own any other real estate in Bexar County, Texas, or elsewhere."

Under the provisions of the statute, the judgment lien, when duly established, will "operate upon all of the real estate of the defendant situated in the county where such

record and index are made, and upon all real estate which the defendant may thereafter acquire situated in said county": Rev. Stats., art. 3159. The lien, however, cannot be extended to the homestead of the defendant, which the constitution and laws exempt from forced sale and every character of lien except those specially enumerated in the constitution: Const., art. 16, sec. 50; Freeman on Executions, sec. 249 d.

It has been held in this state, however, that a judgment lien when once fixed upon the land of the defendant will be superior to a subsequently acquired homestead right in such land: *Wright v. Straub*, 64 Tex. 66. It is also the established doctrine in this state that when the homestead has been voluntarily sold, the proceeds of such sale are not protected by the exemption laws from the claims of the creditors, although the sale was made with the intention of purchasing another homestead. The reinvestment and acquisition of another homestead must be complete before the protection can be invoked; for it is the homestead itself which the constitution exempts, not the money with which one may be acquired in the future: *Kirby v. Giddings*, 75 Tex. 679, and cases cited.

In view of the principles announced in these decisions, as well as the terms of the statute above cited, the counsel for the appellants contend that the lien of the appellants' judgment attached to the land in dispute at the very moment it was acquired, and before it became a homestead, and therefore it may be sold in satisfaction of the debt and lien. We do not concur in this view of the case. We are of the opinion, under the undisputed facts in evidence, that as soon as the appellee obtained the title to the property in question, it became immediately impressed with the homestead character, and therefore the judgment lien could not and did not attach to it: *Crawford v. Richeson*, 101 Ill. 351.

The appellee purchased it for a home for himself and family, and had no other, and at the very time was actually occupying and continued thereafter to occupy it as his homestead. The lien could not attach until the land became the property of the defendant, and the very moment that it did become his property, as we have seen, it became his homestead also, upon which the lien could not operate.

The property in controversy was, therefore, protected from the operation of the lien, not because the purchase money was exempted (for such was not the case), but because the land

itself was exempt, as the homestead of the appellee, immediately upon its acquisition.

From the sale of the old to the purchase of the new homestead there was a continuing intention upon the part of the appellee to make the land in dispute his home, and simultaneously with its purchase he was actually occupying and using it in that character and for that purpose: *Eby v. Foster*, 61 Cal. 282; *Cowgell v. Warrington*, 66 Iowa. 666; *Watkins v. Davis*, 61 Tex. 414; *Gardner v. Douglass*, 64 Tex. 76. Under such circumstances the homestead right of the appellee in the land vested immediately, and was never subject to the judgment lien. Our conclusions are based entirely upon the facts of this particular case, without attempting to indicate what should be the proper criterion upon a different state of facts.

The judgment should be affirmed.

HOMESTEAD, JUDGMENT LIEN ON: See extended note to *Vanstony v. Thornton*, ante, 496. Proceeds of the sale of exempt property are not exempt: *Knabb v. Drake*, 23 Pa. St. 489; 62 Am. Dec. 352.

ROTHSCHILD v. DAUGHER.

[85 TEXAS, 332.]

THE ACKNOWLEDGMENT OF A DEED to a trustee taken before him as a notary public is void, although he had no pecuniary interest in the deed, and after it was executed declined to act under it and another trustee was substituted for him, who made the sale of the property upon the contingency authorized by the deed.

Davis, Beall and Kemp, for the appellants.

No brief for the appellees reached the Reporter.

GAINES, A. J. This suit was brought by Annie M. Daugher, joined by her husband, against W. M. Chandler, trustee, Theo. Rothschild, substitute trustee, and Charles Jacobs & Co., beneficiaries in a certain deed of trust executed by the plaintiffs, to enjoin the sale under the power in the deed of certain real estate, the property of the wife. Chandler, the original trustee, having declined to make the sale, Rothschild was appointed by the beneficiaries as his substitute, and at the institution of the suit had advertised the property for sale.

The deed in trust was accompanied by the privy acknowledgment of Mrs. Daugher, but it was taken before W. M.

Chandler, a notary public, who is the same person that is named as the original trustee in the instrument. Upon this ground the court below held the deed in trust void, and entered a decree perpetuating the injunction. There were other grounds upon which the validity of the proposed sale was attacked, but the conclusion at which we have arrived renders it unnecessary to consider them.

The precise question here presented has never been passed upon in this court, unless it was in the case of *Brown v. Moore*, 38 Tex. 648. In the deed of trust under consideration there is no express provision allowing the trustee any compensation for executing the trust. In the case referred to, the report does not make it clear whether the instrument which was there held void contained such express provision or not. We would infer from the statement of the case that it did not. But the court in the opinion say, "the trustee was interested in the conveyance to the extent of his commissions, and was therefore incompetent as an officer to take an acknowledgment of the deed."

Whether the court determined that a trustee was entitled to compensation, in the absence of an express provision in the deed allowing it, or whether they understood the deed as containing such express stipulation, it is impossible to say. But in either event, if we should hold that without such stipulation a trustee is entitled to remuneration for his services in making the sale, the decision would be in point, and would be decisive of the question before us. But we are not prepared to so hold; and leaving that point undecided, we will treat the question before us from the other standpoint.

Conceding, for the sake of the argument, that the trustee would not have been entitled to compensation for his services in making the sale, the question is, Did he in that case have the power to take the wife's acknowledgment to the deed of trust? We think the case of *Sample v. Irwin*, 45 Tex. 567, approaches very nearly a decision of the question. In that case the notary who took the acknowledgment of the deed of trust had signed it as agent of the beneficiaries, and for that reason the acknowledgment was held void. The court in the opinion say: "If the fact of agency raises a presumption of pecuniary interest, the case of *Brown v. Moore*, 38 Tex. 648, is in point. But whether such be the presumption or not, we think that one who identifies himself with the transaction, by placing his name on the face of the instrument as the

avowed agent of one of the parties, is not competent to give it authenticity as an officer."

A party to a deed is generally held incompetent to take the acknowledgment of the grantor. The officer who took the acknowledgment of the mortgagors in the present case is a party to the conveyance. In form at least the instrument purports to convey the lot to him in trust in order to secure the payment of the debt of the beneficiaries. Whether he had any pecuniary interest or not, he is identified with the transaction. We think it safe to hold, that a party to a deed or mortgage is not competent to take the acknowledgment of the instrument.

It is insisted, however, that because Chandler, the original trustee, declined to act under the instrument, and refused to make the sale, he was not a party to the deed of trust, and therefore, was not disqualified to take the acknowledgment of the mortgagors. If it had appeared especially upon the instrument itself that he had declined to accept the trust before the acknowledgment was taken, the point would have been worthy of serious consideration. But when he took the wife's acknowledgment he was bound to know the contents of the instrument, and that he was the trustee in it; and yet it does not appear that he declined in any manner to accept under it. The presumption is that he did accept, and we therefore think that he was not competent to take the acknowledgment at the time it was taken, and that his subsequent refusal to act did not cure the original want of authority.

If the deed of trust had been upon land not the separate property of the wife, and hence not dependent for its effect upon a certificate of her privy examination and acknowledgment, and if attested by subscribing witnesses, it would have been good between the parties and all persons holding under them with notice, although the acknowledgment was invalid: *Bennett v. Shipley*, 82 Mo. 448; *Darst v. Gale*, 83 Ill. 136. But being a mortgage of the wife's separate estate, it is of no effect.

In *Darst v. Gale*, 83 Ill. 136, the court say: "The trustees were empowered to act separately and in the alternative; that is to say, if by circumstances one became disqualified or was unable to act, another might act. The acknowledgment was taken by Grove, one of the parties named as trustees. This unquestionably rendered the deed void as to him, but we fail

to comprehend how it affected the deed as to the other trustees. He and they had no community of interest, and his becoming disqualified had no tendency to disqualify them. But aside from this, since the execution of the deed of trust is proved *aliunde* the acknowledgment, and the trustee had no beneficial interest in the trust, we are of the opinion that the proof of execution was sufficient, without regard to the sufficiency of the acknowledgment, so far as relates to the purposes of the case before us."

In the last proposition we fully concur. But we will say, with due respect to the court whose opinion we quote, as we trust, that it seems to us the fact that one of the trustees took the acknowledgment did not make the deed any worse than it would have been without an acknowledgment. The fact, however, that the officer who took the acknowledgment was one of the trustees made the acknowledgment itself a nullity. And such, we think, was the effect of the same fact upon the acknowledgment to the deed of trust in the case now before us.

To hold that a party to a deed is incompetent to take the acknowledgment of a party to it, we think a safe and salutary rule.

We find no error in the judgment, and it is affirmed.

AN ACKNOWLEDGMENT OF A DEED cannot be taken by a grantee therein, though the conveyance is to him as trustee: *Bowden v. Parrish*, 86 Va. 67; 19 Am. St. Rep. 873. A clerk who is a subscribing witness to a deed is not disqualified from taking the acknowledgment of its execution: *Trenwith v. Smallwood*, 111 N. C. 132. In *Stevenson v. Brasher*, 90 Ky. 23, it was held that the fact that a county clerk was a grantee in a deed does not disqualify him to take the grantor's acknowledgment. For a full discussion as to when a disqualification to take an acknowledgment does or does not exist, see the notes to *Withers v. Baird*, 32 Am. Dec. 757, and *Livingston v. Kettelle*, 41 Am. Dec. 170.

FRANCO-TEXAN LAND CO. v. MCCORMICK.

[85 TEXAS, 416.]

A CORPORATION CANNOT EMPOWER AN AGENT TO DO AN ACT WHICH MAY NOT BE LAWFULLY DONE UNDER ITS CHARTER.

CORPORATIONS. — ACTS DONE IN EXCESS OF THE POWER CONFERRED BY A CHARTER are void in the sense that they can have no effect to divest the corporation of any right in or to any property belonging to it. All persons attempting to contract with the corporation must take notice of the powers conferred upon it by its charter.

CORPORATIONS. — A CONVEYANCE PURPORTING TO BE MADE BY A LAND CORPORATION BY ITS PRESIDENT of its lands in exchange for personal property is void, and the taking of the note of a third person in payment for such land is exchanging it for personal property.

CORPORATIONS — PRINCIPAL AND AGENT, PRESUMPTION AS TO EXTRAORDINARY FACTS. — If an act performed by an agent of a corporation is in excess of the corporation's charter or the agent's authority, except in extraordinary circumstances, the existence of those circumstances will not be presumed as against the corporation, but must be proved by one claiming them to have existed.

NOTICE. — ONE IS NOT A PURCHASER IN GOOD FAITH FROM OR UNDER A CORPORATION when the deed under which he claims title purports to be made in consideration of the exchange of real for personal property, and the charter of the corporation does not authorize its lands to be conveyed for such a consideration.

CORPORATION CANNOT BE PRECLUDED FROM RECOVERING LAND CONVEYED BY ITS PRESIDENT WITHOUT AUTHORITY because the consideration, or some part of it, was paid to him, in the absence of evidence that any part of the money received by him was paid over to the corporation or applied to some corporate purpose.

G. A. Kirkland, and McCall and Mosley, for the plaintiff in error.

Cockrell and Cockrell, for the defendant in error.

STAYTON, C. J. The leading facts involved in this case, on which the rights of the parties largely depend, are the facts stated in the case of *Fitzhugh v. Franco-Texan Land Co.*, 81 Tex. 306.

Before that action was brought, Thomas McCormick had bought one of the sections of land in controversy in that cause, but as he was not made a party, the judgment therein rendered is not binding upon him.

He brought this action against the Franco-Texan Land Company, in form trespass to try title, alleging title to one of the sections the president of the company attempted to convey to Martin. He attempts to deraign title through Martin, and to so much of his action a plea of not guilty was filed.

He further alleged, however, that at the time he purchased the land company was asserting a lien on the land to secure the payment of the purchase money, and that in addition to the indemnity furnished through the warranty in the deed under which he claimed, he required and received from Martin and Clayton, the latter being only a surety, a bond to indemnify him against the lien claimed by the land company, and against any claim the land company might make and enforce.

He made Martin and Clayton parties to this action.

His prayer against the land company was for the recovery of the land, and for the cancellation of any claim that company might assert; and he prayed, in the event of a recovery against him by the land company, a judgment against Martin and Clayton on their indemnity bond.

The land company filed a cross bill, in which it set up the invalidity of the deed made by its president to Martin, alleging the same matters as in the case before referred to; and under this prayed for a cancellation of the deeds under which plaintiff claimed.

In the event, however, that the company should not be entitled to hold the land, it prayed an enforcement of its lien, for the *pro rata* payment of the purchase money unpaid, against the section of land in controversy, but gave no basis upon which to do this other than a statement of the purchase money still due on the twenty-six sections of land, and their area.

To this cross bill exceptions general and special were filed, and one of these exceptions questioned the right of the land company to the equitable relief sought, because there was no offer to return to plaintiff the money paid by him for the section of land.

The exceptions were overruled.

Plaintiff further answered the cross bill, and, among other things, alleged, that he was an innocent purchaser of the land, and that he paid one thousand twenty dollars and fifty cents for it, relying upon the deed made by the president of the company to Martin; and the evidence tends to show that he had no notice of the facts which gave invalidity to the deed made by the president of the land company, other than such as appeared on the face of that deed.

That he paid the purchase money for the land was proved,

and the district court rendered a judgment in his favor for the land, on the ground that he was an innocent purchaser.

In the decision of this case the court of civil appeals waived a decision of the question whether the recitals in the deed made by the president of the land company to Martin were sufficient to affect plaintiff with notice of the invalidity of the deed, but affirmed the judgment, on the ground that the land company had not offered to pay to the plaintiff such part of the money received by the company from Martin as the section of land in controversy bore to all the land the president of the company attempted to convey to Martin.

There is nothing presented in this case that would render inapplicable the rules of law announced in *Fitzhugh v. Franco-Texan Land Co.*, 81 Tex. 806.

It was not shown in either case that power was at any time expressly conferred on the president of the corporation; but, as held in the former case, apparent power, a holding out, in former course of dealing might justify persons in dealing with him to believe that he had power not only to execute a deed, but also to make a contract for the sale of land, in the usual course of business, by which the corporation would be bound.

The authority of an agent of a corporation must necessarily depend, as that of the agent of a person, on the terms of his appointment, and they differ, in this respect, only in that a corporation cannot empower an agent to do any act which may not lawfully be done under its charter, while a person may empower his agent to do any act not forbidden by law.

This difference arises from the fact that the charter of a private corporation does not simply confer the corporate franchise, but is also an agreement between the shareholders as to the business to be conducted, and as to the powers to be exercised in reference thereto; and for the protection of all shareholders, all business conducted or powers exercised, when not authorized by the charter, must be held not to be binding on the corporation.

Acts so done in excess of power conferred by the charter are void, in the sense that they can have no effect to divest the corporation of right in or to any property belonging to it.

In this respect, it matters not whether the power of the agent be expressly given or be implied from the usual course of business; for all persons must take notice, when they at-

tempt to contract with a corporation, of the powers conferred upon it by its charter.

In the former case it was held, that the charter of the land company gave to it no power to exchange for personal property the lands it was authorized to acquire.

The president of the corporation having no power, under the charter, to convey to Miller, all persons claiming through the deed to him are affected with notice of every fact recited in the deed made to him.

The deed to Miller recited a consideration of forty-nine thousand nine hundred twenty dollars, of which nine thousand nine hundred twenty dollars was cash, a note for nine hundred fifty dollars and the balance thus, "and the further consideration of a certain promissory note for forty thousand dollars, bearing ten per cent interest from date, executed by J. H. Milliken, December 15, 1884, to W. G. Martin, or bearer, and transferred by said W. G. Martin to R. W. Duke, president of Franco-Texan Land Company, on the eighteenth day of February, 1885, due and payable on December 16, 1886, the same being in full payment of the balance of the purchase money of the lands hereinafter described."

This was all that appeared in the deed, as to the character of the obligation given in full payment of balance of purchase money, but when the instrument was offered in evidence it appeared that it might be paid in horses at a price named.

Of this fact McCormick had no notice when he purchased, but he was affected with notice that a promissory note, made by a person other than the vendee, was taken in absolute payment of forty thousand dollars of the purchase money, to secure the payment of which no lien was reserved.

We do not see in what respect the taking of the note of a third person in payment of so much of the purchase money would differ in principle from the taking of any other personal property in payment, for in either case it would be simply an exchange or barter of real estate, in so far, for personal property.

If the president of the company, having power to sell and convey for cash, or, under the by-laws, on credit, had sold and made a deed reciting that the land had been paid for in cash, then a person ignorant of the falsity of this might become an innocent purchaser; for the sale and conveyance would have been within the apparent power of the agent, and any person would be entitled to rely upon the express, or even the im-

plied, representation that the facts existed that empowered him to convey.

If a state of facts possibly might have existed under which the president of the corporation would have been empowered to sell and convey the land as he did, their existence cannot be presumed if they are necessarily outside of the usual course of the business of the corporation, or the leading purpose for which it has existence.

"A party dealing with an agent is not entitled to assume the existence of any extraordinary state of facts in order to bring the acts of the agent within the scope of his apparent authority. Hence, if an act performed by an agent of a corporation would be in excess of the company's charter or the agent's authority, except under extraordinary circumstances, the company can be held bound by such act only provided these extraordinary circumstances did exist": Morawetz on Private Corporations, 606.

If the power to be exercised be not clearly within the express or fairly within the implied powers given by the charter, nor within the grant of power, with its necessary incidents, found in the appointment, nor within the apparent power of the agent, however that may be exhibited, but be a power which for its existence must invoke some extraordinary state of facts not of a nature to be known to the agent only, and clearly out of the usual course of business, then it would seem to be the duty of a person seeking to acquire right through the exercise of the power to inquire as to its existence and as to the facts which bring it into being.

In the usual course of business it is shown that sales were made for cash, or if on credit, with lien to secure the purchase money unpaid; while under the contract the president and Martin assumed to make, the paper of a third person was taken in absolute payment of the greater part of the purchase money; and thus, in so far, the lien the law would have given had the purchaser executed his own notes was destroyed; for to its existence the nonpayment of the purchase money was an essential fact.

Under the facts, we are of opinion the plaintiff was not an innocent purchaser, the agent having no real power to make the sale and conveyance made.

The president having, at most, only an apparent power to sell and convey in any case in due and ordinary course of business, we are of opinion that the recitals in the deed to

Martin affect all persons claiming through it with notice that he exceeded his power in making the sale.

This being true, the plaintiff, on that branch of his case which asserted his title to the land, failed to show right in himself, simply because the land company had not been divested of title by the unauthorized conveyance made by its president.

This is not a case, in so far, in which a person seeking equitable relief must do equity before such relief will be granted, but is a case in which the plaintiff shows no title to the land, either legal or equitable, while the defendant shows a legal title.

In such a case the holder of the legal title is clearly entitled to a judgment; and that it may have asked, by way of cross bill, relief of an equitable nature, in the event it was not entitled to the land, cannot affect this question.

If the plaintiff be entitled to have defendant repay all or any part of the sum he paid for the land, upon showing the facts that entitle him to such relief, the court has full power to give it; but it has no legal power, under the facts of this case, to deny to defendant the right which results from legal title to the land, simply because it may not have offered to do equity.

If it be conceded that under the facts of this case plaintiff, through the conveyance to him on failure of title to the land, would have the same right as would Martin had he not conveyed, we do not think that a case was made by the pleadings or proof which would ever have authorized a judgment against the defendant for any sum of money upon the conveyance to Martin being held void.

It was the right of the land company to repudiate the transaction its agent attempted to consummate simply because he had no power to make the contract, and the company was therefore not bound by it; but under the general rules of equity it could not have the land and the money paid by Martin also; but the mere fact that the money was paid by Martin to the president of the company, when assuming to act for the company, would not furnish ground for recovery against the company, and still less for refusing to give full protection to defendant's legal right, because some part of the money had not been paid or offered to plaintiff by the company.

Before any such right can exist, it must be shown that the

money was appropriated to the use of the company through some corporate agency, acting within the scope of its express or implied authority: Taylor on Private Corporations, 310-312; Morawetz on Private Corporations, 714, 715.

If the money was actually received by the corporation, it should account for it to the proper person if it had used it; if it had it on hand, or had property received under such circumstances, it should restore it, and ought to pay the value of anything received by it, and used for a legitimate corporate purpose.

In this case there is nothing to show that any sum paid by Martin ever came into the possession of the corporation, or that it was applied to a corporate purpose, and under such facts no judgment could have been rendered in favor of the plaintiff on account of any sum that may have been paid to Duke.

A payment to Duke, the president, was not a payment or delivery to the corporation, sufficient in itself to fix liability on it.

It may be that the rule invoked in the court of civil appeals could not be given effect, even in so far as to require the return of any of the money paid by Martin, in view of the fact, that if even received by the corporation, it may, as is indicated in the pleadings, have been returned to Martin in the cause before referred to, without notice from any source, that plaintiff had bought the section of land.

If through his negligence in failing to give notice of his claim, all the purchase money had been returned to Martin, a court of equity might possibly refuse any relief at all as against the defendant; but it is not necessary to decide these questions.

In view of the uncertainty as to the sum which should be returned for the purchase money of the section of land in controversy, if defendant be under obligation to do this at all, and of the fact that on demurrer the trial court held this not to be necessary, we do not think the judgment could be legally affirmed, even if the case was one in which the maxim that "he that seeks equity must do equity," had application to the case.

The judgment of the court of civil appeals and the judgment of the district court will be reversed, and the cause remanded, that the parties may so amend their pleadings as to have adjusted any equities that may exist between them.

It is so ordered.

THE case of *Fitzhugh v. Franco-Texan Land Company*, 81 Tex. 306, referred to in the principal case, was an action brought by the corporation to cancel a conveyance of thirty-three sections of land made by its former president to W. G. Martin and J. H. Milliken. The alleged causes for cancelling the conveyance were fraud and want of authority on the part of the president to sell the property upon the terms on which he had made the conveyance. Two conveyances were drawn in question, one of which purported to convey twenty-six sections of land in consideration of the sum of nine thousand nine hundred twenty dollars paid in cash, and the sum of nine hundred fifty dollars due one day after date, as evidenced by the purchasers' note, and the further consideration of a note of forty thousand dollars, executed by one of the purchasers to the other, and transferred by the latter to the president of the land company. The conveyance declared that these notes were received in full payment of the balance of the purchase price of the land. The other conveyance was dated March 10, 1885, and purported to convey eight other sections of land in consideration of the reconveyance to the corporation of seven of the sections of land conveyed by it in the first deed. The promissory note taken as part of the consideration in the first deed was payable in horses of a certain breed, at thirty dollars per head. It further appeared that it was a part of the agreement accompanying the first deed, that the vendor should not be entitled to any lien to secure unpaid purchase money.

The trial court found that the president was not authorized to convey land on credit without reserving a vendor's lien, and that he had no authority to sell land for a promise to pay money which the promisors were entitled to discharge in horses at a stipulated price per head. The appellate court sustained the judgment of the trial court, determining, as in the principal case, that the agent could not have authority to do that which the corporation had no power to do; that any authority possessed by the president as agent of the corporation must have been derived from the board of directors, but that such authority might probably be conferred by vote not entered of record, and that though power was not conferred by vote or resolution, it might "be implied from a recognition or adopting of the agent's transactions or other acts on the part of the directors which would reasonably induce third parties dealing with him to believe, and act upon the belief, that he has an authority to do the act in question." The charter of the corporation authorized it to acquire lands by purchase or otherwise, and to manage, lease, sell, and convey the same in lots or subdivisions. The by-laws declared that the lands of the company "might be sold or leased for cash or on credit, and at such times and on such terms as may be determined by the board of directors." The majority of the directors resided in Paris and held their meetings there, while the president resided and kept his office in Texas. No express authority to the president to make a sale of the lands of the corporation was shown, but it was proved that the persons filling this office had habitually exercised this power, "and that their action had been recognized by the other officers of the corporation"; but the evidence also showed that in no instance until the transaction here in question had the corporation sold any land to any person upon a credit without retaining a lien upon it for the unpaid purchase money. It was also proved by a large number of witnesses that the invariable custom in selling lands in the country where those in controversy were situated was to retain a vendor's lien when the sale was made, in whole or in part, upon a credit. The appellate court held, that while it might be inferred that the presidents of the corporation had

power to make sales, that it was not to be inferred "that they were empowered to make sales upon terms materially variant from those upon which such sales were uniformly made." Furthermore, it was determined that the power to sell and convey did not carry with it the power to exchange lands for personal property, particularly when the corporation charter did not authorize it to acquire or hold personal property for the purposes of trade.

CORPORATIONS — AGENTS — HOW FAR POWERS OF EXTEND. — Corporations act through the instrumentality of agents to whom the authority of the corporation may be delegated so far as may be necessary to effect the purposes of its creation, if not prohibited by charter: *Washburn v. Nashville etc. R. R. Co.*, 3 Head. 638; 75 Am. Dec. 784. In the absence of a provision to the contrary in the charter, a corporation may appoint an agent and empower him to perform certain acts: *Mitchell v. Deeds*, 49 Ill. 416; 95 Am. Dec. 621. A corporation cannot be bound by a contract of its president unless power to bind it is given by the act of incorporation, or is authorized by the corporation to make the contract: *Mt. Sterling etc. Road Co. v. Looney*, 1 Met. (Ky.) 550; 71 Am. Dec. 491, and note. See also extended note to *Hodges v. New England Screw Co.*, 53 Am. Dec. 639.

CORPORATIONS — ACTS DONE IN EXCESS OF POWER CONFERRED BY CHARTER. — A contract by a corporation which is forbidden by its charter is void: *President etc. v. Swayne*, 8 Ohio, 257; 32 Am. Dec. 707, and note with cases collected. Chartered corporations are held to a strict observance of the limitations of their chartered powers: *Martin v. Pensacola etc. R. R. Co.*, 8 Fla. 370; 73 Am. Dec. 713, and note. A corporation has power to do only such business as it is authorized by its act of incorporation to do: *Elevator Co. v. Memphis etc. R. R. Co.*, 85 Tenn. 703; 4 Am. St. Rep. 798, and note. For a further discussion of this subject, see the extended note to *Leavitt v. Palmer*, 51 Am. Dec. 341.

CORPORATIONS — DUTY OF PERSONS CONTRACTING WITH. — He who deals with a corporation is chargeable with notice of its powers and the purposes for which it is formed: *Jemison v. Citizens' Sav. Bank*, 122 N. Y. 135; 19 Am. St. Rep. 482, and note; *Elevator Co. v. Memphis etc. R. R. Co.*, 85 Tenn. 703; 4 Am. St. Rep. 798; *Bocock v. Alleghany Coal etc. Co.*, 82 Va. 913; 3 Am. St. Rep. 128. Where a state has reserved to itself the power by general statute to change, modify, or destroy any corporation at will, all persons dealing with a corporation are bound to take notice of such general law: *Macon etc. R. R. Co. v. Gibson*, 85 Ga. 1; 21 Am. St. Rep. 135.

HOGUE v. WILLIAMSON.

[85 TEXAS, 553.]

A PROMISSORY NOTE OR BILL OF EXCHANGE MAY BE MADE PAYABLE IN THE MONEY OF ANY COUNTRY. — It is wholly immaterial in the currency or money of what country it is payable. The fact that a note is payable in Mexican silver dollars does not destroy its negotiability nor divest it of any of the attributes of a promissory note, except that the recovery thereon must be for its value in American money.

George C. Altgelt, for the appellant.

W. W. Herron, for the appellee.

GAINES, A. J. This is a question certified to us for determination by the court of civil appeals for the third supreme judicial district. The certificate is as follows:—

“The plaintiff, Hogue, brought suit against defendant, Williamson, upon a written obligation, which reads as follows:—

“SALTILLO, January 25, 1888.

“On or before May 1, 1888, I promise to pay C. C. Hogue or order, one thousand Mexican silver dollars.

“GEORGE S. WILLIAMSON.

“\$1,000, Mex.

“The petition alleges that on May 1, 1888, Mexican dollars were each worth eighty-five cents in ‘American coin,’ and plaintiff asks judgment for eight hundred fifty dollars. He states in his petition that the note is payable in Mexican silver dollars.

“The defendant filed a general denial, and also averred in his answer, under oath, that the note sued on was given for money which the plaintiff had won from defendant in a game with cards, and was therefore illegal and void.

“Upon the trial in the court below the plaintiff put in evidence the written obligation sued on, and proved that on May 1, 1888, Mexican silver dollars were worth eighty cents each. The plaintiff then rested, and the defendant introduced no testimony.

“The court instructed the jury to return a verdict for defendant, which was done, and judgment entered accordingly.

“If the instrument sued on was a promissory note, this is error: *Newton v. Newton*, 77 Tex. 511.

“With this explanation the court of civil appeals for the third supreme judicial district certifies and submits to the supreme court for decision as part of the law of this case, as a new or novel question, the following proposition:—

“Was the burden of proof on the plaintiff, after the introduction of the instrument sued on, to show nonperformance of its obligations by defendant? In other words, is the written obligation sued on a promissory note, obligating its maker to pay a certain sum of money, or is it an ordinary contract for the delivery of a certain commodity; and must the plaintiff, by affirmative testimony, show a breach of the contract?”

We are of the opinion that the instrument in question is a promissory note. It is such in form and substance, unless the fact that the sum payable is expressed in Mexican silver

dollars should make a difference. Speaking of the sum for which a bill of exchange must be drawn, Mr. Chitty says, "it may be the money of any country": Chitty on Bills, 160. Judge Story says: "But provided the note be for the payment of money only, it is wholly immaterial in the currency or money of what country it may be payable. It may be payable in the money or currency of England, or France, or Spain, or Holland, or Italy, or of any other country. It may be payable in coins, such as in pounds sterling, livres, tomnosis, francs, florins, etc., for in all these and the like cases the sum of money to be paid is fixed by the par of exchange, or the known denomination of the currency with reference to the par": Story on Promissory Notes, sec. 17. The same rule is distinctly laid down in 1 Daniel on Negotiable Instruments, section 58, and in Tiedeman on Commercial Paper, section 29b. In view of the opinion of these eminent text writers, it is remarkable that we have found but two cases in which the question is discussed or decided.

In *Black v. Ward*, 27 Mich. 191, 15 Am. Rep. 162, it is held, that a note made in Michigan payable in Canada in "Canada currency," is payable in money and is therefore negotiable; but in *Thompson v. Sloan*, 23 Wend. 71, 35 Am. Dec. 546, a note made in New York and payable there in "Canada currency," was held not negotiable. The court, however, say: "This view of the case is not incompatible with a bill or note payable in money of a foreign denomination, or any other denomination, being negotiable, for it can be paid in our own coin of equivalent value, to which it is always reduced by a recovery. A note payable in pounds, shillings, and pence, made in any country, is but another mode of expressing the amount in dollars and cents, and is so understood judicially. The course therefore in an action on such instrument is to aver and prove the value of the sum expressed in our own tenderable coin."

This decision was made in 1840, and it is to be inferred that at that time the dollar was not a denomination of the lawful money of Canada. We also infer, that when the Michigan case arose, this had been changed and the denomination of Canada money corresponded with that of the United States. Upon this theory, it would seem that the cases may be reconciled. The language quoted from the opinion in *Thompson v. Sloan*, 23 Wend. 71, 35 Am. Dec. 546, indicates clearly, that if the money named in the note had been a denomination of Canada money, the ruling would have been different, un-

less perchance, the word "currency" would have affected the question. The note we have under consideration is for Mexican silver dollars — coins recognized by the laws of the United States as money of the Republic of Mexico: U. S. Rev. Stats., sec. 3576.

We conclude that the note sued upon in this case was a negotiable promissory note, and that when the plaintiff offered it in evidence, and proved the value of the Mexican dollar at the time of its maturity, he had made a *prima facie* case, and our opinion will be certified accordingly.

NEGOTIABLE INSTRUMENTS. — A note payable in current bank notes is nonnegotiable, and an indorser of it is liable only when he especially contracts to be so, or when he transfers the paper fraudulently, and not upon indorsement: *Kirkpatrick v. McCullough*, 3 Humph. 171; 39 Am. Dec. 158, and note. The case of *Klauber v. Biggerstaff*, 47 Wis. 551, 32 Am. Rep. 773, contains a thorough discussion of the question as to whether or not bills and notes payable to order in "currency," or current bank notes and the like, are negotiable. In that case it was held that "currency" means money, and bank notes issued by lawful authority and in circulation at par with coin, and that a certificate of deposit payable to order in "currency," is negotiable. The contrary doctrine is maintained in *Hue v. Hamblin*, 29 Iowa, 501; 4 Am. Rep. 244.

WESTERN UNION TELEGRAPH CO. v. CARTER.

[85 TEXAS, 580.]

A TELEGRAPH CORPORATION IS NOT CHARGEABLE WITH NOTICE THAT THE WIFE OF A PERSON TO WHOM A MESSAGE IS ADDRESSED IS RELATED TO A PERSON WHOSE DEATH IS ANNOUNCED THEREIN, WHEN THE COMPANY HAD NO KNOWLEDGE OF THE EXISTENCE OF THE WIFE, NOR OF HER RELATIONSHIP TO THE DECEDENT.

TELEGRAPH COMPANIES. — WHEN A MESSAGE CONVEYING INFORMATION OF THE DEATH OR SERIOUS ILLNESS OF ANOTHER PERSON IS NOT DELIVERED, THROUGH THE NEGLIGENCE OF THE TELEGRAPH CORPORATION, IT IS NOT NECESSARY, TO SUSTAIN RECOVERY OF DAMAGES BY THE ADDRESSEE, THAT THE MESSAGE ON ITS FACE DISCLOSE HIS RELATIONSHIP TO SUCH ILL OR DECEASED PERSON. IN SUCH A CASE, THE TELEGRAPH CORPORATION IS CHARGEABLE WITH NOTICE OF THE RELATIONSHIP EXISTING BETWEEN THE PARTIES NAMED IN THE MESSAGE, AND OF THE PURPOSES FOR WHICH THE COMMUNICATION IS MADE.

TELEGRAPH CORPORATIONS. — DAMAGES FOR THE NONDELIVERY OF A MESSAGE ANNOUNCING THE DEATH OF A PERSON CANNOT INCLUDE A SUM EXPENDED BY THE ADDRESSEE IN EXHUMING THE BODY OF THE DECEDENT BECAUSE, OWING TO THE NONRECEIPT OF THE MESSAGE, IT DID NOT RECEIVE PROPER CARE IN RESPECT TO INTERMENT.

TELEGRAPH CORPORATIONS. — DAMAGES FOR THE NONDELIVERY OF A MESSAGE ANNOUNCING THE DEATH OF A PERSON CANNOT INCLUDE A SUM AWARDED FOR MENTAL ANGUISH CAUSED BY THE MANNER AND PLACE OF HIS BURIAL.

Walton, Hill and Walton, for the plaintiff in error.

W. F. Robertson, for the appellant in error.

BROWN, A. J. This case was tried before the judge without a jury, and findings of fact filed, which were adopted by the court of civil appeals, and, so far as applicable to the questions involved here, are: That the telegraph company had offices and operators at Taylor and Smithville, about fifty miles apart. W. S. Carter lived at Taylor; his wife, M. E. Carter, was the daughter of N. B. Gorsuch, who died near Smithville, on the fourth day of September, 1889. About six o'clock of that day F. S. Faust delivered to the operator at Smithville the following message:—

“SMITHVILLE, 9-4, 1889.

“To W. S. CARTER, Taylor:

“N. B. Gorsuch is dead. Answer.

“F. S. FAUST.”

This message was not delivered to Carter until 11:55 A. M. of the next day. If it had been delivered with reasonable promptness W. S. Carter and M. E. Carter could have reached the place where the remains were before the burial. They set out as soon as possible after receiving the message, but reached the place after the body had been buried. The body was buried in the clothes the deceased wore at the time of his death, in an uninclosed lot. W. S. Carter had the body disinterred and removed to another place, at an extra cost of twenty dollars. The operator at Smithville, who received the message, did not know the relationship between Carter and deceased, nor that Carter had a wife. About an hour after the message was transmitted, he was informed that Carter was the son-in-law of deceased. The operator at Taylor did not know the facts until after the message was delivered.

The district court gave judgment for the plaintiff Carter for twenty-five cents paid for the transmitting of the message, and costs of court, and for the sum of twenty dollars expenses incurred by him in exhuming and removing the body. Also for one thousand dollars for the mental suffering caused to M. E. Carter by reason of the failure to reach the place before the body was buried, and on account of the place and manner of the burial of her father. The court of civil appeals affirmed the judgment of the district court, and a writ of error was granted to the court of civil appeals by this court.

The plaintiff in error presents this assignment of error for

our consideration: "The court erred in its conclusions of law, that defendant is chargeable with notice, or is affected with notice, by the terms of the message, of the relationship of either W. S. Carter, who is named, or M. E. Carter, who is not named, in the message, to N. B. Gorsuch, or of any other purpose or object of said message than to advise W. S. Carter of Gorsuch's death, and to obtain an answer."

As to M. E. Carter the objection is well taken. She is neither mentioned in the message, nor was there any actual notice of her relationship to deceased: *Western Union Tel. Co. v. Kirkpatrick*, 76 Tex. 217; 18 Am. St. Rep. 37; *Elliott v. Western Union Tel. Co.*, 75 Tex. 18; 16 Am. St. Rep. 872. The facts of this case are as nearly identical with *Western Union Tel. Co. v. Kirkpatrick*, 76 Tex. 217, 18 Am. St. Rep. 37, as it is possible to make two cases with different names and dates. Plaintiffs had no right to recover against the defendant the telegraph company for the damages alleged to have occurred to Mrs. Carter, and the judgment of the court was therefore erroneous and must be reversed.

As to W. S. Carter, the objections presented in this assignment are not well taken. The only case decided by this court that will support the proposition made is that of *Western Union Tel. Co. v. Brown*, 71 Tex. 723, which has been practically overruled by all succeeding cases involving the same points. That no doubt may hereafter exist, we here expressly overrule that case, in so far as it asserts the proposition that it is necessary that a message must disclose the relationship of the persons named in it. Since the case of *Western Union Tel. Co. v. Brown*, 71 Tex. 723, the cases decided in this court have held contrary to the contention of the plaintiff in error.

In the cases of *Western Union Tel. Co. v. Adams*, 75 Tex. 531; 16 Am. St. Rep. 920; *Western Union Tel. Co. v. Feegles*, 75 Tex. 537; *Western Union Tel. Co. v. Moore*, 76 Tex. 66; 18 Am. St. Rep. 25; *Potts v. Western Union Tel. Co.*, 82 Tex. 545; and *Western Union Tel. Co. v. Jones*, 81 Tex. 271; the messages conveyed information of serious illness of a person named.

In the following cases the information conveyed by the messages related to the death of the party named: *Western Union Tel. Co. v. Broesche*, 72 Tex. 654; 13 Am. St. Rep. 843; *Western Union Tel. Co. v. Rosentreter*, 80 Tex. 406; and *Western Union Tel. Co. v. Nations*, 82 Tex. 539; 27 Am. St. Rep. 914. In the foregoing cases the same questions arose as are here presented,

and this court held in each that the telegraph company was chargeable with notice of the relationship that existed between the parties named in the message and of the purposes for which the communication was sent. In the case of *Western Union Tel. Co. v. Broesche*, 72 Tex. 654, 13 Am. St. Rep. 843, the name of the plaintiff did not appear connected with the message, but the operator who received it knew that it was sent for him, and the company was held bound upon such actual notice, the same as if plaintiff had signed it.

In the case of *Western Union Tel. Co. v. Adams*, 75 Tex. 531, 16 Am. St. Rep. 920, Justice Henry, delivering the opinion of the court, said, in reference to objections similar to these: "The rule insisted upon by the appellant is too restricted to be applied to communications sent by the electric telegraph." And again in the same opinion he says: "When such communications relate to sickness and death, there accompanies them a common-sense suggestion that they are of importance, and that the persons addressed have in them a serious interest." And again the same judge, in that case, with much force announces the following eminently just and correct proposition for the government of such companies: "When the general nature of the communication is plainly disclosed by its terms, instead of requiring the sender to communicate to the unwilling ears of the busy operator the relationship of the parties concerned, a more reasonable rule will be, when the receiver of the dispatch desires further information about such matter, for him to obtain it from the sender, and if he does not do so, to charge his principal with the information that inquiries would have developed."

In *Western Union Tel. Co. v. Moore*, 76 Tex. 66, 18 Am. St. Rep. 25, Justice Gaines, delivering the opinion of the court, said: "We are of opinion that tested by the rules announced in the cases cited, the message under consideration was sufficient to reasonably apprise the defendant of the consequences of its failure to deliver the message according to contract. The conclusion to be drawn from the language of the message is, that a near relationship existed between the person mentioned in the message and the person to whom it was addressed, and that upon its receipt the latter would probably set out at once to attend his relation in his extremity. Such being the case, it would be unreasonable to hold that the company, upon the receipt of the message, should not have contemplated the consequences which were likely to result to

plaintiff from a failure to transmit it with diligence and dispatch."

In the case now before the court, the message was addressed to W. S. Carter, and notified the company that Gorsuch was dead; that Carter was in all probability a near relative with "a serious interest" in the intelligence communicated, and in all probability upon the receipt of the message would set out at once to attend the funeral and to care for the remains. The probable purpose of adding the word "answer" was to learn whether or not the message was delivered, and whether or not the party addressed would be able to arrive in time to attend the burial or to direct it.

From the rules laid down in the foregoing decisions of this court, this plain and just rule may be deduced: The telegraph company is chargeable with notice of the relationship that exists, if any, between all parties named in the message, and with notice of such purposes as may be reasonably inferred from the language used, in connection with the subject-matter of the communication, taking into consideration the usual manner of expressing messages sent by this means.

The plaintiff in error presents also the following assignment of error: "The court erred in rendering judgment for the plaintiffs beyond twenty-five cents, the cost of the message, and of this suit, because the facts in evidence show that the damages awarded plaintiffs over and above the cost of the message are not such as could or will be deemed to have been in contemplation of the defendant at the time of entering into the contract as probable consequences of the breach complained of." This objection is well taken to the judgment, on two grounds.

1. The twenty dollars adjudged to plaintiffs for the extra expense of exhuming the body and removing it to a different place can not by any stretch of imagination be regarded as proximately the result of the failure to deliver the message in due time. It could not have been foreseen that if the message were not delivered promptly, or if not delivered at all, the persons in charge of the remains would inter it in a place that would not be satisfactory to Carter, nor could it have been known that in such event Carter would desire to disinter and remove the body.

2. In determining the amount of the damages to Mrs. Carter on account of the grief caused to her, the court says, in its finding of facts, that "in addition to the sorrow and grief that

Mrs. Carter necessarily suffered because of the death of her father, her failure to reach Smithville in time to attend the funeral and pay the last sad tribute due from the living child to the dead parent, and the manner and place of his burial, caused her to suffer further mental pain and anguish to her actual damages one thousand dollars." Some part of the one thousand dollars was given for the anguish caused by "the manner and place of the burial." How much we cannot tell, but it is unquestionable that the anguish caused by this fact of "place and manner" of burial was not an element of damages proper to be considered by the court. How could it be said that the burial in an unsatisfactory place, or in clothing unsuitable, were the probable results of the failure to deliver the message, or that such a thing could or was contemplated by the parties as a consequence of such failure?

Plaintiff W. S. Carter was entitled to recover from the telegraph company the price paid for transmitting the message, and the costs of the district court, but he was not entitled to recover the other amounts; and the judgments of the district court and the court of civil appeals are reversed, and judgment is here rendered for W. S. Carter against the Western Union Telegraph Company for the sum of twenty-five cents and all costs of the district court, and in favor of the Western Union Telegraph Company against W. S. Carter for all costs of the court of civil appeals and of this court.

Reversed and rendered.

TELEGRAPH COMPANIES — NOTICE FROM FACE OF MESSAGE. — A dispatch in the words, "Billie is very low, come at once," sent by a sister to her brother, and relating to another brother, is sufficient on its face to give the telegraph company notice of its object and of the relationship between the parties, and to render it liable in damages for mental suffering from a failure to deliver the message promptly: *Western Union Tel. Co. v. Moore*, 76 Tex. 66; 18 Am. St. Rep. 25, and note. A telegraph message, "Emma died last night; will be buried this evening," gives sufficient notice of its importance: *Western Union Tel. Co. v. Rosentreter*, 80 Tex. 406. See *Western Union Tel. Co. v. Jones*, 81 Tex. 271, and *Western Union Tel. Co. v. Feegles*, 75 Tex. 537, to the same effect.

TELEGRAPH COMPANY — MESSAGE ANNOUNCING SICKNESS OR DEATH — LIABILITY FOR MENTAL SUFFERING. — A recovery may be had against a telegraph company for mental suffering resulting from its negligence in failing to deliver with diligence the message announcing the dangerous sickness of a relative, when the language used is sufficient to put the company on inquiry as to the relationship: *Young v. Western Union Tel. Co.*, 107 N. C. 370; 22 Am. St. Rep. 883, and note; *Western Union Tel. Co. v. Kirkpatrick*, 76 Tex. 217; 18 Am. St. Rep. 37, and note; *Western Union Tel. Co. v. Ber-*

inger, 84 Tex. 38; *Chapman v. Western Union Tel. Co.*, 90 Ky. 265. And see also *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695; 6 Am. St. Rep. 864, and note. The contrary doctrine is maintained by the following cases: *West v. Western Union Tel. Co.*, 39 Kan. 93; 7 Am. St. Rep. 530, and see note; *Gulf etc. R'y Co. v. Levy*, 59 Tex. 563; 46 Am. Rep. 278, and note; *Chapman v. Western Union Tel. Co.*, 88 Ga. 763; 30 Am. St. Rep. 183, and note. See *Western Union Tel. Co. v. Wilson*, 93 Ala. 32; 30 Am. St. Rep. 23, where it was held that damages for mental suffering could be recovered in such cases, provided there was other ground for damages either nominal or substantial. See extended note to *Western Union Tel. Co. v. Cooper*, 10 Am. St. Rep. 778.

CAMERON v. GEBHARD.

[85 TEXAS, 610.]

HOMESTEAD RIGHTS ATTACH TO A LOT WHICH HAS BEEN PURCHASED FOR A HOMESTEAD, AND WHICH THE PURCHASER INTENDS TO USE AS SUCH, though he has not yet occupied it, and it is not fit for such occupancy until he can have a residence built thereon, if he is proceeding in good faith to secure the erection of such residence for the purpose of using it as his home.

L. C. Alexander, for the plaintiffs in error.

Scarborough and Rogers, and Pearre and Boynton, for the defendants in error.

BROWN, A. J. Plaintiffs in error sued the defendants in error in the district court to enforce a material man's lien upon a certain lot in the city of Waco. The case was tried before the judge without a jury, and findings of the facts were made and filed on the written motion of the plaintiffs. The findings of the district judge were adopted by the court of civil appeals. Judgment was given against plaintiffs, which was affirmed by the court of civil appeals, and a writ of error granted by this court.

The facts are, briefly, that Mary Gebhard owned a lot in Waco as her separate property, which was the homestead of herself and her husband; they sold that homestead and purchased the lot upon which it is sought to foreclose the lien in this suit, with a part of the proceeds of such sale. At the time of the purchase, and at all times, they declared that they intended to make the lot so purchased their homestead. Gebhard made a contract with Turntine to build a house upon the lot, Turntine to furnish lumber and erect the building for a given price. Turntine was unable to purchase the lumber, and Gebhard entered into a contract with the plain

tiffs to furnish to Turntine the lumber necessary for the building, the cost of the lumber to be deducted from the price agreed to be paid to Turntine. Defendant Gebhard transferred to plaintiffs a note which he had received for a part of the purchase price of his former homestead, as an advance payment on the lumber to be furnished. Plaintiffs knew at the time that they agreed to furnish the lumber that defendants had sold their former homestead, and purchased this lot with the intention to make it their future homestead; that they had contracted with Turntine to build a residence upon the lot, and that the lumber to be furnished by them was to be placed in that residence. They furnished the lumber, which was used in erecting a residence on the lot, and the amount sued for is an unpaid balance on the lumber so furnished. There was no improvement upon the lot in question, and Gebhard had taken no steps to establish his homestead on it other than the making of the contract with Turntine to build the house upon it. No contract in writing was made, but in all other respects the requirements of the law for fixing a lien on the property were complied with by plaintiffs.

The only question presented for our consideration in this case is, was the lot in question the homestead of defendants at the time that the contract for the purchase of the lumber from plaintiffs was made? If it was not, the judgment should be reversed. If it was a homestead at that time, the judgment should be affirmed.

Upon the facts presented in this case, we hold that the homestead right in favor of defendants had attached to the lot sought to be subjected to the lien asserted before the contract for the purchase of the lumber was made, and that plaintiffs in error having failed to make a contract in writing, signed and acknowledged as required by law, no lien was created upon the lot.

It is not necessary that we should in this case decide whether or not Turntine acquired a lien, or could without writing have fixed a lien on the lot.

Cases arising under homestead laws differ so widely in their facts, it is impossible to lay down any definite rules to govern in all cases that may arise. Each case must be determined upon its own peculiar state of facts; and oftentimes, with very slight difference in the facts, conclusions have been reached in different cases which present the appearance of

conflict, when in fact there is none, the facts being understood.

Pope v. Graham, 44 Tex. 196, on first reading would seem to be to some extent in conflict with the conclusion announced in this case. But when the facts of that case are understood, there is no such conflict. The statement given of the facts in *Pope v. Graham* in the published report does not show what the intention of Pope was as to the future use of the property, or that any intention in reference thereto had been formed at a date anterior to the making of the contract. Referring to the original record in that case, we find that the only evidence introduced on the trial relative to the homestead referred to the date of the trial. The opinion expressed upon that point was evidently based upon the conclusion that the homestead right was not asserted until after the contract for building was made. That this was the understanding of the judge who delivered the opinion is made clear by his reference to the case of *Potshuisky v. Krempan*, 26 Tex. 309, in which the homestead right was not asserted until after the lien had attached.

In *Franklin v. Coffee*, 18 Tex. 413, 70 Am. Dec. 292, Chief Justice Hemphill, delivering the opinion, said: "Nor would it be necessary to secure the exemption that a house should be built or improvements made. . But there must be a preparation to improve, and this must be of such a character and to such an extent as to manifest beyond a doubt the intention to complete the improvement and to reside upon the place as a home." Again, in the same case, it is said: "In this case there was no house or home upon the land. The plaintiff had not resided there before or since his marriage. He had made no preparation or done no acts which would evince a fixed intention and purpose to select and appropriate the place as a home." The facts in that case justified the conclusion that there was no homestead, but the court announced a rule which has been followed in all subsequent cases.

These principles enunciated in that case have been recognized and applied by this court in the cases of *Moreland v. Barnhart*, 44 Tex. 280; *Houston etc. R. R. Co. v. Winter*, 44 Tex. 611; *Barnes v. White*, 53 Tex. 631; *Brooks v. Chatham*, 57 Tex. 33; *Swope v. Stantzenberger*, 59 Tex. 390; *Gardner v. Douglass*, 64 Tex. 76; *Archibald v. Jacobs*, 69 Tex. 251; *Dobkins v. Kuykendall*, 81 Tex. 183, and many other cases.

The case of *Stone v. Darnell*, 20 Tex. 11, was in fact decided

upon the same principle as that enunciated in the case of *Franklin v. Coffee*, 18 Tex. 413, 70 Am. Dec. 292. Darnell had not lived upon the land, but had sold a former homestead, and with the proceeds purchased the land in question, with the avowed purpose and intention of making it his homestead, and he had made a contract for the building of a house on it. The court did not in the opinion put it upon that ground, but it is evident that these facts had a controlling influence upon the conclusion arrived at in the case. The opinion was likewise delivered by Judge Hemphill. It is most likely that he would be governed by the doctrine announced by him but a short time before. This court has so understood and interpreted that case.

In the case of *Houston etc. R. R. Co. v. Winter*, 44 Tex. 611, Chief Justice Roberts, referring to the case of *Stone v. Darnell*, 20 Tex. 11, said: "In the case of *Stone v. Darnell* such acts were done as were said to indicate the intention to appropriate the place as a home, and although not a home, literally, when levied on, but being such at the sale, it was exempt as a homestead."

In *Barnes v. White*, 53 Tex. 631, there was no actual occupancy, but ownership with an intention to occupy, accompanied by preparation. The person claiming the homestead had partially constructed his house when he purchased the material to complete it, and the court held that no lien attached. The only difference in that case and the one under consideration is, that a greater degree of progress had been made in the preparation to occupy.

In *Dobkins v. Kuykendall*, 81 Tex. 183, the claimant of the homestead had never lived upon the land, but declared his intention to make it his home. He hauled some logs, and placed them on it, but not being able to complete the house, suspended work, and rented lands at another place, and made no further effort to occupy it for a year. It was held that the homestead right attached to the land. In that case there was not so much preparation as in this. There a foundation was laid, and a few logs hauled; in this, a contract had been made for the construction of the entire house. The diligence is wanting in that case that distinguishes this case. There the work was suspended for more than a year, while in this case the diligence went to the point that defendant in error, after finding that his contractor could not purchase lumber, stepped in and made the purchase for him.

In *Scott v. Dyer*, 60 Tex. 135, the party asserting the homestead right had lived upon a tract containing four acres in Paris, and had sold the improved part, and moved away, but with the intention to make a home upon the remainder. No act was done to evidence this intention. The land was levied upon, and sold under execution. The court held that the land was the homestead of the defendant in the suit. That is a case in which the bare intention kept the homestead right alive, when the house had been sold and the party took no steps to carry the intention into effect.

In *Gardner v. Douglass*, 64 Tex. 76, the party asserting the homestead claim had purchased an improved place for the purpose, and with the avowed intention of making it a homestead. It was leased, and he could not get possession of it at the time. It was seized before he moved upon it, and the court held that his intention to occupy, with the fact that he could not get possession, were sufficient to give the homestead exemption.

This court said, in *Swope v. Stantzenberger*, 59 Tex. 390: "In a great majority of the states it is held that an actual occupation of the land must concur with the dedication, as a prerequisite to impressing upon it the homestead character. But a more liberal rule prevails in this state," and proceeds to quote from *Franklin v. Coffee*, 18 Tex. 413, 70 Am. Dec. 292, and other cases, to show what that more liberal rule is.

It is held in Michigan more liberally even than in this state. The doctrine of that state is laid down thus: "Actual residence upon property is not an indispensable condition to its being in law a homestead, and as such exempt from levy and sale under execution; the question is, whether, on the facts of the particular case, the land became a homestead, in a legal sense, before the levy was made upon it. To bring it within the exemption, when it is not actually occupied as such at the time of the levy, it must satisfactorily be made to appear that the intention, in good faith, exists to occupy it as such, and the intention must have existed prior to and at the time of the levy: *Bowles v. Hoard*, 71 Mich. 154; *Reske v. Reske*, 51 Mich. 541; 47 Am. Rep. 594; *Mills v. Hobbs*, 76 Mich. 125.

In Wisconsin the rule is stated thus: "The *bona fide* intention of acquiring the premises for a homestead, without defrauding any one, evidenced by overt acts in fitting them to become such, followed by actual occupancy in a reasonable time, must be held to give to the premises answering the de-

scription prescribed in the statute the character of a homestead": *Scofield v. Hopkins*, 61 Wis. 375. It is no doubt true that a majority of the states hold a more rigid rule against the homestead claim, but we believe that the better reason is with the doctrine of our own court.

In *Archibald v. Jacobs*, 69 Tex. 251, Chief Justice Stayton, delivering the opinion, said: "Where no homestead dedicated by actual occupancy exists, effect must be given to ownership, intention, and preparation to use for a home; otherwise one indebted might never be able to secure a home for a dependent family."

Intention alone cannot give a homestead right; but it is at the same time equally true that all other things combined cannot give it without the intention to dedicate it to the uses of a home. Valuable and costly improvements, coupled with long-continued possession, without the existence of a *bona fide* intention to make it a home, will not make it such; but the placing upon the premises unhewn logs for the purpose of erecting thereon the humblest cabin, with a *bona fide* intention to occupy as soon as the cabin can be built, secures the right.

From these decisions it is apparent that intention is almost the only thing that may not be dispensed with in some state of case; and it follows that this intention in good faith to occupy is the prime factor in securing the benefits of the exemption. Preparation, that is, such acts as manifest this intention, is but the corroborating witness to the declaration of intention, the safeguard against fraud, and an assurance of the *bona fides* of the declared intention of the party.

If a homestead cannot be acquired until it is occupied, then no one can acquire a homestead exempted from forced sale unless he buys an improved place; and then he must have a race with the sheriff for possession. The unimproved lands of the country and the vacant lots of our cities cannot be acquired for the purpose of making a home by the man who is indebted, except at the risk of turning it over to a creditor. If a man owes nothing, or is able to pay all that he owes, he does not need the exemption; if he has other property, he can protect his home by pointing out that other property for sale; but if he has nothing but the homestead, he comes within the necessity of the constitutional provision, and to him is the chief value of exemption.

Defendants in error showed their good faith by investing the proceeds of sale of their former homestead in this lot, and

and at once proceeding, in accordance with their declared intention, to secure the erection of a residence upon it. What more diligence could have been exercised in carrying that intention into effect, or what act could have been done that would more satisfactorily have proved that the intention was in good faith to dedicate it to homestead uses?

Plaintiffs in error could have secured a contract in writing, as required by law. They knew that the lot was to be the homestead; knew all the facts. The wife might not have been willing to encumber this lot, but preferred to have a more humble home, free from lien. She was entitled to the privilege of deciding the matter for herself.

The judgments of the court of civil appeal and of the district court are affirmed.

HOMESTEAD — NECESSITY FOR ACTUAL OCCUPANCY. — In order to secure a homestead exemption it is not necessary that a house should be actually built or improvements made upon the land, but there must be preparation to improve of such a character as to manifest beyond doubt an intention to complete the improvements and reside upon the place as a home: *Franklin v. Coffee*, 18 Tex. 413; 70 Am. Dec. 292, and note; *Reske v. Reske*, 51 Mich. 541; 47 Am. Rep. 594; *Dobkins v. Kuykendall*, 81 Tex. 180. Actual residence upon land intended as a homestead is not necessary in law to it being a homestead, and, as such, exempt from levy and sale upon execution: *Bowles v. Hoard*, 71 Mich. 150. In the following cases, it was held that actual occupancy of the premises was essential to the creation and existence of the homestead right: *Currier v. Woodward*, 62 N. H. 63; *Quehl v. Peterson*, 47 Minn. 13; *Boreham v. Byrne*, 83 Cal. 23; *Tillotson v. Millard*, 7 Minn. 513; 82 Am. Dec. 112; *Christy v. Dyer*, 14 Iowa, 438; 81 Am. Dec. 493, and note; *Gregg v. Bostwick*, 33 Cal. 220; 91 Am. Dec. 637, and note. See extended notes to *Pryor v. Stone*, 70 Am. Dec. 347, and *Arendt v. Mace*, 9 Am. St. Rep. 202.

CASES
IN THE
SUPREME COURT
OF
WASHINGTON.

PARKE v. SEATTLE.

[5 WASHINGTON, 1.]

MUNICIPAL CORPORATIONS — LIABILITY FOR THE REMOVAL OF LATERAL SUPPORT. — A municipal corporation which, in grading a street, makes an excavation so negligently as to let down a portion of the soil of an abutting lot, is liable not only for the injuries occasioned thereby to the soil itself, but also for such injuries as the buildings and other improvements upon the lot may receive, unless it appears that the subsidence was caused by their weight, and that the soil in its natural condition would have remained intact.

Greene and Turner, for the appellant.

Orange Jacobs and George Donworth, for the respondent.

STILES, J. The appellant, as plaintiff in the superior court, brought this action against the city of Seattle to recover damages from the municipality for so negligently excavating certain streets abutting upon his premises as to cause the hillside, of which his premises formed a part, to bodily slide down into the streets, and thus cause great and permanent impairment of the value of his premises, and the destruction of his buildings and other improvements. To the complaint the defendant demurred, and the demurrer was sustained, and judgment against the plaintiff rendered accordingly.

The premises were at the intersection of Sixth and Mill Streets. The improvements, which embraced a house, out-buildings, fence, lawn, shrubbery, etc., all worth five thousand dollars, were made in 1886, and the alleged damage was done at some time before the adoption of the constitution, in 1889. The complaint charged: —

"4. That at the time of making said improvements, and always up to the time of the commission of the grievances hereinafter mentioned, the soil and earth of said premises, and the adjoining soil and earth of said Mill and Sixth Streets, and of said alley, and the soil and earth immediately to the eastward of said premises and alley, eloped downward from east to west at an average and natural rate of, to wit, one foot vertical to four feet horizontal, and the soil and earth of said premises were so related to the soil and earth in said Sixth and Mill Streets adjoining said premises, and to the soil and earth in said alley adjoining said premises, and to the soil and earth lying within several hundred feet immediately to the eastward and northward of said alley and premises, that the soil and earth of said Sixth and Mill Streets, adjoining said premises, formed the natural and necessary support of the soil and earth of said premises, and formed, together with the soil and earth of said premises, the natural and necessary support of the soil and earth in said alley adjoining said premises, and formed, together with the soil and earth of said premises, and the soil and earth of said alley adjoining said premises, the natural and necessary support of the soil and earth immediately to the eastward and northeastward of said alley and premises; all which the said city at the time of the commission of said grievances, and at all times, well knew.

5. That, after the making of the improvements mentioned in the third paragraph of this complaint, said city graded said Mill Street, and so carelessly, negligently, and unskillfully excavated the soil and earth in said Mill and Sixth Streets, adjoining said premises of plaintiff, and so carelessly, negligently, and unskillfully left such excavation without any proper or any means of support for the soil and earth of said premises, or for the soil and earth of said alley adjoining said premises, or for the soil and earth lying immediately to the eastward and northeastward of said alley and premises, that all the soil and earth of said premises, and of said alley adjoining the same, and all the soil and earth for several hundred feet immediately to the east and northeast of said alley and premises, all forthwith began, and thenceforth hitherto have continued, and still continue, and will indefinitely continue, to creep, slide, move, and go southwesterly and downwards in the direction of said slope, and upon, over, across, and off of said premises and into said Sixth and Mill Streets and Yesler Avenue, in such quantities and to such an extent

that much more and many times more soil has long ago fallen into said Sixth and Mill Streets out and off of said premises by reason of said excavation and said carelessness, negligence, and unskillfulness than was or is sufficient to give the natural slope of such earth for such excavation, and in such manner and to such an extent that great quantities of soil and earth have come and are coming upon said premises out of and off of said alley, and out and off of the land immediately to the eastward and northeastward of said alley and premises, by reason of said excavations and said carelessness, negligence, and unskillfulness, all to the great injury and destruction of said premises, and the said improvements thereon, and to the damage of plaintiff in the sum of seven thousand seven hundred twelve dollars (\$7,712); that such creeping, sliding, moving, and going were not, nor was or is any of the same, caused by, or in any measure or degree caused by, or attributable to, the weight of or otherwise to said buildings or improvements, or any thereof, or any part thereof."

This pleading presents the question whether, before the constitution, a municipal corporation was liable for any damage caused by its having taken away the lateral support from lands abutting on a street which it was grading. Two grounds of recovery are urged, viz.: 1. The damage to the land by causing it to slide off; and, 2. The damage to the improvements on the land. If this suit were between private persons, the first element of damage would be recognized as proper if there was substantial injury done, but the recognition of the second would depend on whether there was negligence on the part of the excavator in making his excavation. This summary of the rule is amply considered and explained in *Gilmore v. Driscoll*, 122 Mass. 199, 23 Am. Rep. 312. But the respondent objects that because it was engaged in a lawful opening and improving of streets it cannot be held liable for such injuries. The basis of this claim is that such injuries are what the courts term "consequential," which are without remedy. There is no doubt that what are termed "consequential" injuries are by most of the courts held to be remediless, although nearly all of the courts in this country have at one time or another regretted the existence of such a rule, and that they could not under the law follow the decisions of the supreme court of Ohio, which are to the contrary. Yet we find a number of the states granting relief in cases of the particular character of the one at bar, and although they

are sometimes loosely denominated "consequential injuries," the fact is that they are not consequential, but direct, injuries. Judge Dillon, in his *Municipal Corporations*, section 991, says: "Where the power is not exceeded, there is no implied or common law liability to the adjacent owner for grading the whole width of the street, and so close to his line as to cause his earth or fences and improvements to fall, and the corporation is not bound to furnish supports or build a wall to protect it. The abutting owner has, as against a city, no right to the lateral support of the soil of the street, and can acquire none from prescription or lapse of time." He also says, in section 990: "There is no such implied or common-law liability, even though in grading and leveling the street a portion of the adjoining lot, in consequence of the removal of its natural support, falls into the highway."

This authority is strongly relied upon by the respondent in this case, but after a careful examination of the citations made by the learned author, while we do find his text is fully sustained in very numerous cases in England and in this country, where purely consequential injuries have been suffered, we also find that the cases which he cites to support the proposition that the abutting owner has, as against the city, no right to lateral support, do not sustain him. In all these cases cited it was either the inconvenience of access caused by the change of grade or the necessity of going to expense in sustaining the weight of buildings erected upon the abutting owner's land close up to the line of the street, that was the ground of the action. No one of them was maintained for the removal of the lateral support of the abutter's land. It is more than likely that in these cases no damages were sought for the caving of the land itself, because the actual damage resulting from such a caving in most instances would be but little, if anything, more than nominal; but where the caving or sliding is as extensive and material as it is in this case, and knowledge of the nature of the soil, and of the certainty that it would cave and slide, is charged upon the city, as appears by the complaint in this case, it would certainly be a great hardship, indeed, if the city could go on with gross recklessness to remove what it must have seen was the only support for the whole hillside. Knowledge of the character of the soil, and of its certainty to cave so as to materially injure the beneficial use of the land, would make

it negligence for the city to go on with its work without providing means to resist the threatened calamity.

A similar view was taken of this matter in the case of *Keating v. Cincinnati*, 88 Ohio St. 141, 43 Am. Rep. 421, where the facts were almost identical in every particular with those at bar. That case was decided not alone upon the authority of the Ohio cases, the peculiarities of which have been alluded to, but upon that of other leading, well-considered cases, particularly that of *Gilmore v. Driscoll*, 122 Mass. 199; 23 Am. Rep. 312. The same court had previously held, in *City of Cincinnati v. Penny*, 21 Ohio St. 499, 8 Am. Rep. 78, that the corporation was not liable for damages to buildings caused by negligence in making the excavation, where their weight contributed to the injury: See also the very recent case of *Stearns v. City of Richmond*, 88 Va. 992; 29 Am. St. Rep. 758. In that case the right to recover was extended to buildings. The court used this language:—

“Every owner of land is entitled, as against his neighbor, to have the earth stand and the water flow in its natural condition. . . . In the case of land, which is fixed in its place, each owner has the absolute right to have his land remain in its natural condition, unaffected by any act of his neighbor; and if the neighbor digs upon or improves his own land so as to injure this right, an action may be maintained against him without proof of negligence. And although this natural right does not extend to buildings increasing the downward and lateral pressure, and therefore, if damage is done to them by digging in the adjoining soil, no action can be maintained therefor unless negligence be proved, yet it is settled by the recent decisions in England, and it would seem clear upon principle, that where land upon which there are buildings slides, or subsides by reason of such digging, and the buildings are in consequence damaged also, and their weight in no way contributed to the result, then the damage done to the buildings may be taken into consideration in estimating the damages”: *Brown v. Robins*, 4 Hurl. & N. 186; *Stroyan v. Knowles*, 6 Hurl. & N. 454; *Lewis on Eminent Domain*, secs. 100, 151.

The time has been when it was the fashion of courts to regard the state or its instruments (municipal corporations) as in some way superior in their right to do mischief to the individual over private persons; as, for instance, in *St. Louis v. Gurno*, 12 Mo. 414, where a city which improved a street

under competent authority was held not responsible for any damage it might cause by defects in the plan of its improvement, whereby masses of water were thrown upon the lands of abutting owners, although it was conceded that if the plan were negligently executed there might be liability. But such cases have since been substantially overruled, as *St. Louis v. Gurno*, 12 Mo. 414, was expressly overruled in *Thurston v. City of St. Joseph*, 51 Mo. 510, 11 Am. Rep. 463, on the ground that the casting of masses of water and earth upon the premises of an abutting owner is a taking of lands within the constitutional prohibition. The leading case of *Pumpelly v. Green Bay Co.*, 13 Wall. 166, set at rest all such claims on the part of public corporations, and is of especial authority in this case, the facts of which occurred during our territorial existence. Speaking of these consequential injuries, and the ruling of courts thereon, the court said:—

“But we are of the opinion that the decisions referred to have gone to the uttermost limit of sound judicial construction in favor of this principle,—that is, the nonliability for consequential injuries,—and in some cases beyond it, and that it remains true that where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it so as to effectually destroy or impair its usefulness, it is a taking within the meaning of the constitution, and that this proposition is not in conflict with the weight of judicial authority in this country, and certainly not with sound principle.”

But what possible distinction there can be between the injury which is occasioned by casting water, earth, sand or other material upon one's land, and having the entire surface of the land dragged or forced away, it is hard to comprehend. Wherein is the one less a “taking” than the other? Another case in the United States supreme court is that of *Transportation Co. v. Chicago*, 99 U. S. 635. The plaintiff owned warehouse property which abutted upon La Salle Street and the Chicago River. The city, in building a tunnel under the river, excavated the street and erected a cofferdam in the river, the effect of which was to cut off access to the warehouses from both the street and the river during the time the work was in progress. This injury, and certain alleged injuries to the building, by reason of the negligent excavation, were sued for. It will be observed that the tempo-

rary obstruction of the access was purely a consequential injury, which, the court held, there could be no recovery for. But after ruling on this point against the plaintiff, the circuit court charged the jury that if they found that the injuries to the building were caused by the negligent and unskillful manner in which the work was done by the city, and not by reason of the weight of the building, and if the building had not been repaired so as to make it as useful for the plaintiff's purposes as it was before the injuries occurred, then the plaintiff would be entitled to such damages as would make it as useful for its purposes. On appeal, the supreme court said concerning this charge: —

“There was evidence at the trial that during the progress of the necessary excavation of La Salle Street a portion of the walls of the plaintiff's buildings on the lot cracked and sunk. This was caused by the caving in of the excavation in the street, the timbers used for bracing the sides having given way. . . . We think this instruction was entirely right. The general rule may be admitted that every landowner has a right to have his land preserved unbroken, and that an adjoining owner excavating on his own land is subject to this restriction; that he must not remove the earth so near to the land of his neighbor that his neighbor's soil will crumble away under its own weight and fall upon his land. But this right of lateral support extends only to the soil in its natural condition.” See, also, *Thurston v. Hancock*, 12 Mass. 220, 7 Am. Dec. 57.

The complaint in this case is sufficiently specific in describing the acts constituting the alleged negligence through which the plaintiff suffered injury to meet the requirements of good pleading. The judgment will therefore be reversed, and the cause remanded for trial.

ANDERS, C. J., and DUNBAR, J., concur.

SCOTT, J., dissents.

HORT, J., dissenting, said that, although it was possible that the complaint might be held good against a demurrer, on the ground that it sufficiently charged the defendant with negligence in the work of grading, the majority of the court did not seem to have laid any particular stress upon the language thus used, but to have held the city liable, on the broad ground that it had removed the lateral support of plaintiffs' lot, and was therefore liable for the injury occasioned thereby. It was, in effect, held that, “the right of a city to improve its streets, and, in so doing, change the surface thereof, is governed by the same rules, as to liability to adjoining property,

as is a private owner in changing the surface of his lot." With this conclusion, the learned judge said that he was unable to agree, and, that in view of the unusual importance of the question, he deemed it necessary to state, at considerable length, his reasons for thus dissenting.

After remarking that the majority of the court seemed to have adopted the doctrine that the injury caused by the removal of the lateral support of land is a direct and not a consequential injury, but that, in his judgment, it by no means followed that the acceptance of such a doctrine necessarily involved the inference that a city should be held liable for such an injury when caused by the grading of its streets, he then went on to give his reasons for holding that the injury to the lot in this case was a consequential, not a direct injury: "As I understand the rule, a direct result is one which immediately and necessarily follows the act. A consequential result is one which does not thus follow the doing of the act. If, in every case, the falling of the soil of the adjacent lot followed immediately and necessarily upon the removal of the supporting earth in making the excavation, there would be a greater reason for holding that it was a direct and not a consequential result of such removal. If, at the time any excavation was made, the adjoining soil necessarily and immediately slid or fell into the excavation, it would in effect be the same as though the one making the excavation had directly removed the soil on the adjoining lot. Such, however, is not the ordinary result of making an excavation. The soil may be such that, if the excavation extends to the extreme limit of the street, that of the adjoining lot may never slide into the excavation. And when it does slide, it seldom or never does so to the full extent that it eventually will, immediately upon the earth being removed in making the excavation.

It is no doubt true that in some instances the nature of the soil might be such that that of the adjacent lot would fall immediately upon the support being removed, but such is not usually the case, and the nature of the injury done to the adjoining lot cannot be controlled by such exceptions to the general rule. It would not do for courts to hold that in most cases the injury occasioned by grading was consequential for the reason that it did not immediately and necessarily follow from the act done, and in special cases where it did so follow, that it was direct. The rule established in regard to the matter must be uniform, or questions of fact in each particular case of such nicety and difficulty would be presented as greatly to embarrass corporations and courts."

The learned judge then alluded to the support which his views as to the consequential nature of the injury received from the fact that redress for the removal of lateral support was, under the old rules of pleading, always sought by action on the case and not in trespass, and proceeded as follows: "If the injury in question is consequential, and not direct, then it is clear that under the provisions of the constitutions of most of the states, and of the constitution of the United States, the city would not be liable if the injury resulted from work done by the city in pursuance of authority conferred upon it by the legislature. It is universally held that such corporations, when so proceeding, are not liable for consequential injuries. They are held liable, if liable at all, by virtue of a provision in the constitution of the state where the question arises that private property shall not be taken for public use. And it has never been held that an injury to private property, consequent upon, but not directly flowing from, the acts of the corporation, constitutes a taking within such constitutional inhibition. If the city is liable, it must be by reason of the rule at common law, or of some

provision in the constitution of the state or of the United States. That no such liability existed in England at the time we took from her the common law is too clear for argument and is in fact conceded by all. There is no constitutional or legal provision that has any tendency to create such liability, except the one that prohibits the taking of private property for public use without compensation. It must follow that whenever the injury is such that it does not constitute a taking within the meaning of such provision, there can be no compensation had therefor." The impropriety of gauging the liability of municipal corporations by that of private landowners was then insisted on. "To hold that a city, in changing the grade of its streets, is governed by the same rule as to resulting damages as a private owner would be to deny the city the usual protection awarded an agent of the state acting in pursuance of a public law. . . . When a city proceeds, in pursuance of law, to grade one of its streets, it is acting as the agent of the state and in pursuance of public authority, and cannot be held liable for any injuries done to a private person unless he is protected against such injury by the action of the legislature or by the constitution of the state. That this rule works individual hardship in special cases is unquestioned, but so does every rule for the benefit and protection of the public. The public as a whole have a right to interfere just so far with individual rights as in its judgment is necessary for the public good, and such public is in no manner responsible to private persons for damages resulting from such acts. . . . The improvement of roads and streets is an absolute necessity. The state in providing therefor may do so directly or may delegate its power to various municipalities created for that and other purposes in aid of proper government. In the prosecution of such work by the state or by its properly constituted agents it has a right to proceed in a reasonable manner, and private persons whose rights may be injuriously affected by such action are absolutely without remedy, excepting such as may be furnished by the constitution or legislation had thereunder." The argument *ab inconvenienti* is then taken up and thus enlarged upon: "If the doctrine be once established that the same rule applies, as to responsibility for lateral support, to excavations made by the public in the grading of streets or highways, as would obtain in the case of an excavation made by a private owner upon his property, it must follow that wherever an excavation is so made that any appreciable amount of the soil of the adjoining lot slides or falls into the same, an action for damages will lie. And if an action for damages will lie, it would follow, almost as a necessary conclusion, that until the same had been regularly ascertained and tendered or paid, the work could not be proceeded with. This would compel the proper authorities, who had control of the streets within the cities or of the highways outside thereof, whenever they desired to do any work thereon which might by any possibility require such an excavation to be made that the soil of an adjoining proprietor might fall therein, to determine beforehand by the most careful surface survey the extent to which such excavations would be made and the amount of soil which would fall from the adjoining lots on account thereof, and show the same by the most exact profile and figures, and have the damages on account of such falling soil determined and paid before they proceeded at all with the improvement, or else place it within the power of anyone, the soil of whose lots might fall into such excavation in the least material degree, to stop the work until such proceedings and compensation could be had. Such a course would be practically impossible even in cities, and as regards highways situated outside it would make it impossible to improve the same at all in the way

that it is now ordinarily done, excepting at the peril of having the work arrested, at such a time during its progress as to very greatly interfere with the rights of the public, by any private owner who in good faith or bad faith might desire thus to take advantage of the fact that a wagon load or so of soil from his lot had slidden or would slide into the excavation made or to be made in the progress of the work. The results following from the enforcement of such a rule would be so burdensome upon the public that it would not be adopted by the courts unless compelled so to do by an expression of the will of the public, in the constitution or legislation thereunder, so clear that it would admit of no other possible construction."

The position of a landowner in such cases, as one who might be assumed to have already received adequate compensation for such injuries as might result from the grading of the street, was then dwelt upon. "In my opinion," said the learned judge, "he must be held to have received full compensation for all the damages incident thereto. If the street was dedicated to public use by the owner, he must be held to have so dedicated it for the use of the public as such street, and must have contemplated such a reasonable improvement thereof as would adapt it to the purposes for which it was designed. This, of course, would include such a change in the surface as would best adapt it to the public use. If it was purchased of a private owner, he knew the purposes for which it was so purchased, and in fixing his price therefor could protect himself for injuries incident to the proper use thereof for the purposes for which it was purchased. If it was taken by virtue of the right of eminent domain, the damages awarded upon such taking must be held to cover, not only the valuation of the land taken, but also the incidental damages resulting from its proper use for the purposes for which it was taken. It will thus be seen that in whatever manner the public has obtained the right to the use of the street, the owner has been or might have been fully protected from damages incident to the improvement thereof, and if, whenever the surface is changed, he is allowed to recover damages, it will be for the same elements which were or might have been taken into consideration at the time the property was originally acquired for public use. Upon principle, then, I am of the opinion that a private owner should be held to have no remedy as against the public proceeding diligently in the matter of the improvement of a street, for injuries done to his property by removal of its lateral support."

Judge Hoyt then proceeded to discuss the question in the light of the authorities, remarking, by way of preface, that he could not agree with the language used by the majority of the court in regard to the statement of principles in Judge Dillon's work on municipal corporations, for although many of the cases referred to by the writer were not lateral support cases, their nature was such as to warrant their citation for the purpose of sustaining his text. "Those cases that were not exactly in point cite those which are, and in none of them is there the least intimation that a different rule would have been announced had the injuries been from a deprivation of lateral support instead of the consequent injuries under discussion."

It was then argued that the case of *Pumpelly v. Green Bay Co.*, 13 Wall. 166 and *Transportation Co. v. Chicago*, 99 U. S. 635, which were relied upon by the majority of the court, could not fairly be adduced as authorities for the view adopted, both because they were to be taken strictly with reference to the circumstances passed upon, and because they were to be interpreted in the light of two other decisions of the same tribunal: *Goslar v. Corporation of Georgetown*, 6 Wheat. 593, and *Smith v. Corporation*

of *Washington*, 20 How. 135, which were deemed to support the doctrine of the nonliability of cities for the injuries under discussion. The following cases were then reviewed: *Radcliff v. Mayor etc. of Brooklyn*, 4 N. Y. 195; 53 Am. Dec. 357; *People v. Green*, 64 N. Y. 606; *Benedict v. Goit*, 3 Barb. 459; *St. Peter v. Denison*, 58 N. Y. 416; 17 Am. Rep. 258; *Waddell v. Mayor etc. of New York*, 8 Barb. 95; *Clemence v. City of Auburn*, 66 N. Y. 334; *Cogswell v. New York etc. R. R. Co.* 103 N. Y. 10; 57 Am. Rep. 701; *Heiser v. Mayor etc. of New York*, 104 N. Y. 68; *Oallender v. Marsh*, 1 Pick. 418; *Benjamin v. Wheeler*, 8 Gray, 409; *Brown v. City of Lowell*, 8 Met. 172; *City of St. Louis v. Gurno*, 12 Mo. 414; *Taylor v. City of St. Louis*, 14 Mo. 20; 55 Am. Dec. 89; *Lambar v. City of St. Louis*, 15 Mo. 610; *Hoffman v. City of St. Louis*, 15 Mo. 651; *Schattner v. City of Kansas*, 53 Mo. 162; *Imler v. City of Springfield*, 55 Mo. 119; 17 Am. Rep. 645; *Thurston v. City of St. Joseph*, 51 Mo. 510; 11 Am. Rep. 463; *Wegmann v. City of Jefferson*, 61 Mo. 55; *Broadwell v. City of Kansas*, 75 Mo. 213; 42 Am. Rep. 406; *Green v. Borough of Reading*, 9 Watts. 382; 36 Am. Dec. 127; *O'Connor v. Pittsburgh*, 18 Pa. St. 187; *In re Ridge Street, Allegheny City*, 29 Pa. St. 391; *City of Pontiac v. Carter*, 32 Mich. 163; *Buskirk v. Strickland*, 47 Mich. 389; *Murphy v. City of Chicago*, 29 Ill. 279; 81 Am. Dec. 307; *Roberts v. City of Chicago*, 26 Ill. 249; *Macy v. City of Indianapolis*, 17 Ind. 267; *City of Lafayette v. Bush*, 19 Ind. 326; *City of Vincennes v. Richards*, 23 Ind. 381; *Mayor of Rome v. Omberg*, 28 Ga. 46; 73 Am. Dec. 748; *Roll v. City of Augusta*, 34 Ga. 326; *Mitchell v. Mayor of Rome*, 49 Ga. 19; 15 Am. Rep. 669; *City of New Haven v. Sargent*, 38 Conn. 50; 9 Am. Rep. 360; *Skinner v. Hartford Bridge Co.*, 29 Conn. 523; *Benden v. Nashua*, 17 N. H. 477; *Hovey v. Mayo*, 43 Me. 322; *Alexander v. City of Milwaukee*, 16 Wis. 264; *Pettigrew v. Village of Evansville*, 25 Wis. 223; 3 Am. Rep. 50; *Wallich v. City of Manitowoc*, 57 Wis. 9; *Plum v. Morris Canal etc. Co.*, 10 N. J. Eq. 256; *Methodist Episcopal Church v. City of Wyandotte*, 31 Kan. 721; *Bennett v. City of New Orleans*, 14 La. Ann. 120; *Rounds v. Mumford*, 2 R. I. 154; *Mayor etc. of Cumberland v. Willison*, 50 Md. 138; 33 Am. Rep. 304; *Creal v. City of Keokuk*, 4 G. Greene, 47. The learned judge concludes, as the result of his examination of the cases, that the rule for which he contends is recognized in all the states except Ohio, Minnesota, and Virginia, (the authorities from which are cited in the prevailing opinion), and further notes the fact that the same rule is adopted by all text writers, with perhaps only one exception, Judge Elliott, in his work on streets. Such an examination, he considered, would also show that the rule "does not, in the opinion of the courts, rest entirely upon authority, but is fully consonant with correct principles applicable to the subject-matter." He then concludes as follows: "Besides, in this state there has been full legislative recognition of the rule. If the existence of the rule had not been so recognized there would have been no occasion for the enactment of the law making cities responsible for damages occasioned by a change in the grade of its streets after the same had been once established. This legislation not only recognizes such rule, but shows an intention to leave it in full force so far as the grade first established is concerned."

In the case of *Brown v. City of Seattle*, 5 Wash. 35, the same court was called upon to decide whether the owner of an abutting lot should be granted an injunction to restrain a municipal corporation which was about to grade a street in such a manner as to render access to his premises more difficult. The court declared that previous to the adoption of the constitution of Washington, such an owner would have been without remedy, "ex-

cepting for such injury as might have occurred to his own land alone arising from the withdrawal of the support and its consequent actual falling in, or from the negligence of the city in doing the work," and referred to the ruling in the principal case; but the provision of the constitution that, "no private property should be taken or damaged for public or private use without just compensation having been first paid into court" was said to have changed the former rule, on the ground that the insertion of the word "damaged" must mean that some additional security to private property was intended. Following the lead of every court in which the question had been raised, and also deferring to the general rule of construction that the adoption of constitutional or statutory language by one state from another involves the adoption of the interpretation put upon the borrowed language by courts of the state from which it is derived, the court held that the plaintiff was entitled to the relief asked for, and added that if it had been a case of first impression, then opinion as to the meaning of the inserted word would not have been different. The counsel for the city had contended that a dedication of the street should carry with it the right to raise or lower the surface to any extent deemed proper by the municipal authorities; but the court said that this argument ignored the fact that a street was laid out for the benefit of abutting lots as well as public passage, and that the easement of access over the land in the street was the principal motive and consideration of the dedication. "The only obligation which a city assumes by its acceptance of a street is to maintain thereon a reasonable roadway according to the circumstances. It cannot be compelled to fill up chasms or dig down hills to make the most perfect way for travel of every kind. Its duty is done when, under all the circumstances, it has made provision for travel of the kind suited to the locality. It cannot be compelled to grade or otherwise improve a street, and it loses none of its rights by nonuser. For the construction of whatever improvements it does make, it is now quite the custom to assess the entire cost to the abutting land. A harsh application of the old rule would put the dedicator in the position of consenting to all that the municipality might arbitrarily do, even to the destruction of values in his abutting land; but in fact the contemplation of no such thing as a grade which would actually reduce the value of his abutting land can be imputed to him, since it is not in the nature of men to do things which are patently contrary to their self-interests. . . . To go beyond the strict requirements of this case, and perhaps to invite the charge of promulgating mere *dicta*, a dedication should always be taken as a consent that the natural surface of the street at its center line might be the grade to which the roadway should be leveled from either side. . . . If no street practicable for public use can be made without making cuts or fills which will damage abutting land so as to reduce its value below that which it possessed before the street was begun, none should be undertaken at all unless abutting owners waive damages, or until public necessity shall justify paying the cost of a lower or higher grade." The court then reviewed the circumstances of the case, and expressed an opinion that the lower court was justified in interposing an injunction against the grading. The requirement of the constitution was, that a landowner was entitled to have his damages assessed and paid before the work was done; and in the face of this explicit provision, it was impossible to allow any weight to the objection made by the city's counsel that it could not have been intended by the constitution that the progress of such works should be stopped continually at the instance of abutting proprietors. The doctrine of *Moore v. City of Atlanta*, 70

Ga. 611, to the contrary effect was disapproved; and it was pointed out that *Stetson v. Chicago etc. R. R. Co.*, 75 Ill. 74, by which the ruling was justified, was decided with reference to a constitution which did not require the compensation to be first paid. Hoyt and Scott, JJ., dissented from the above opinion, and the former briefly stated his reasons, laying the principal stress upon the effect of dedication as against the landowner: "When those under whom the plaintiff claims dedicated the street to public use, it is conceded that they, in substance, said: 'Take this street, and use it.' I think it equally clear that they, in effect, further said: 'Improve this street so as to adapt it to use as such.' Such adaptation would, of course, include such change in the surface thereof as was necessary to best adapt it to the purposes for which it was designed. If such was the effect of the dedication, it seems clear that the dedicators could not claim damages against the public for doing that which they said it should do; and as the plaintiff could get no better right than those under whom she holds, it follows that for the injuries set out in the complaint, there could be no recovery." The learned judge also said that he disagreed with the opinion of the majority of the court as to the meaning of the constitutional provision against "taking or damaging" private property for public use without compensation; but he considered that the case really turned on the effect of the dedication; and having expressed his views regarding that question, he did not deem it necessary to discuss the other question at length.

MUNICIPAL CORPORATIONS — RIGHT OF LATERAL SUPPORT AS AGAINST. — This subject was treated in the extended note to *Larson v. Metropolitan Street Ry Co.*, 33 Am. St. Rep. 465-467; and reference was there made to the other notes in the series in which the extent to which the general rule as to injuries caused by grading of streets is applicable to cases of the withdrawal of lateral support has been discussed.

BENHAM v. HAM.

[5 WASHINGTON, 128.]

CREDITOR'S BILL — RETURN OF NULLA BONA WHEN NOT NECESSARY TO SUPPORT. — Where a lien has been obtained by attachment of the property in controversy, and it appears by bill that the debtor is insolvent, and that the issuing of an execution would be of no practical utility, the obtaining of the judgment, and the issuance of an execution thereon, are not necessary prerequisites to equitable interference.

ASSIGNMENT FOR BENEFIT OF CREDITORS — PREFERENCE. — A creditor has a right to secure the payment of his debts, even to the extent of absorbing all the estate of his debtor, and to the exclusion of the claims of all other creditors; nor will any presumption of fraud attach by reason of the exercise of this right simply because a short time after the securing of the debt the debtor attempted to claim the benefit of the assignment law.

ASSIGNMENT FOR BENEFIT OF CREDITORS. — PREFERENCE OF A CREDITOR by a failing debtor, who soon afterwards makes an assignment of his property for the benefit of his creditors generally, is not fraudulent, unless it appears that the debtor's intention to make such assignment was known to the creditor, and that the transaction by which the preference was

obtained was separated from the assignment for the purpose of obviating the annulment which would follow if it were contemporaneous with or included in the assignment itself.

CHATTEL MORTGAGES — EFFECT OF PROVISION ALLOWING MORTGAGEE TO SELL. — A chattel mortgage given to secure a *bona fide* debt, and authorizing the mortgagee to sell the goods and apply the proceeds to the extinguishment of the debt, is valid as against the other creditors of the mortgagor.

Jay H. Adams and Jones and Voorhees, for the appellants.

Post and Avery, for the respondents.

DUNBAR, J. The first question that presents itself in this case is, is it necessary to reduce a claim to judgment, issue an execution, and secure a return of *nulla bona* made thereon, to support a creditor's bill? Or is an attachment lien a sufficient basis for such an action? Many cases have been cited both by appellant and respondents on this proposition, and, from an investigation of the cases, it must be conceded that the weight of opinion, considering both the old cases and the new, sustains the doctrine that the claimant must press his claim to judgment, send out his execution, and show a fruitless search for property before he can appeal to a court of equity to set aside a fraudulent conveyance. But we are satisfied that the trend of modern decision is the other way. At all events, the decisions of courts are so conflicting that this court feels justified in adopting that rule which seems to it best calculated to protect the interests of *bona fide* creditors from fraudulent transactions. We think no good purpose can be subserved by compelling a creditor to await his judgment, but that the effect will be to aid dishonest debtors in fraudulently disposing of their property. And especially in view of the language used by the supreme court of the territory in *Meacham Arms Co. v. Swarts*, 2 Wash. (Ter.), 412, and *Thompson v. Caton*, 3 Wash. (Ter.), 31, we feel justified in now deciding that, where a lien has been obtained by attachment on the property in controversy, and it appears by bill that the debtor is insolvent, and the issuing of an execution would be of no practical utility, the obtaining of the judgment and the issuance of an execution thereon is not a necessary prerequisite to equitable interference.

The next question to be considered involves the validity of the mortgage. The mortgage from Doty to Ham was executed on Friday, November 13th, and the assignment of Doty to White was executed the following Monday, to wit,

November 16th. The court below held that the assignment was valid, but that the mortgage was void. It is contended by appellant, that under the circumstances of this case, as shown by the proof, the mortgage to Ham and the assignment to White should be considered together, and being so construed that they should both be held to be void as being contrary to the statutes against preferences. And many cases are cited by both appellant and respondents, respectively, in support of, and opposed to, this doctrine. If the contention of the appellant on this proposition be true, the judgment of the court cannot be sustained either on reason or authority, for if the instruments are to be construed together it plainly follows that if the mortgage is void the assignment is void also. Neither can be held to be void excepting on the theory that the two together comprised a general scheme to prevent an equal distribution of the estate among the creditors, and, of course, it logically follows that, being construed together, they must stand or fall together.

We have carefully examined all the authorities cited on this proposition, and do not think that even many of the authorities cited by appellant sustain his contention in their application to this particular case. In *Berger v. Varrelmann*, 127 N. Y. 281, which was one of the strongest cases cited by appellant, the court seems to have felt itself bound by the findings of the lower court. The contention of the judgment creditor in that case was that the lower court did not find as a fact that the assignors confessed the judgment in contemplation of making a general assignment, as a part thereof, and for the purpose of preferring the creditor in that case, and that the confession of judgment, the execution, and levy were made in fraud of the general assignment, but that the trial judge stated such fact as a conclusion of law. And the appellate court said: "This contention is not well founded; for it is well settled that, though a 'finding of fact' be called a 'conclusion of law,' and improperly classified as such, in the decision signed, it will, for the purpose of upholding the judgment, be given the same effect as though embraced within, and designated as one of, the findings of fact."

Of course if the court accepted these findings of fact, it could not do otherwise than hold the transactions to be fraudulent. It is, after all, a question of intention; a question of the *bona fides* of the transaction. If it is shown to be a fact that the instruments were intended to be a part of one trans-

action, then, of course, they must be construed together, no matter whether they were executed on the same day or on different days; and it must be determined from the circumstances surrounding each particular case whether or not it falls within the rule. It is an undisputed proposition of law that the creditor has a right to secure the payment of his debts, even to the extent of absorbing all the estate of his debtor, and to the exclusion of the claims of all other creditors. This is nothing more than the exercise of good business judgment and prudence, and no presumption of fraud will attach by reason of the exercise of this right, simply because a short time after the securing of the debt the debtor attempts to claim the benefits of the assignment law. The length of time elapsing between the securing of the debt and the execution of the deed of assignment would no doubt be a circumstance that the court would have a right to take into consideration, but it should go no further than that. If the obtaining of security for a deed is presumed to be contemporaneous with the assignment, if made a short time prior to the assignment, how short a time must it be to cause the presumption to attach? Must it be a day, or a week, or a month? An attempt to answer this question shows the folly of trying to fix a time limit. In one case it might appear that the instruments were part of the same transaction if they were executed a month apart; and in another case the mortgage might be given on the same day with the execution of the assignment, and both be executed in perfectly good faith. As was said by the supreme court of Michigan in *Root v. Potter*, 59 Mich. 506: "There is nothing in the assignment law which undertakes to avoid dealings previous to the assignment, whether near or remote in point of time, which were in no way connected with it in the intention of the parties."

The true theory is as expressed by the court in *Burnham v. Haskins*, 79 Mich. 35, and it cannot be carried to any further extent, that the assignment must be looked to to discover the preference, and that the transactions, to be fraudulent, must be found to have been made in separate form to avoid the effect of annulling them if they were included in the assignment itself. When this motive appears, without doubt, the transaction would be void, even under our statute, which is not so broad as many of the statutes under which the cases are cited.

In the case last above cited, the court held the mortgage

void, but it gives its reasons for the holding as follows: "The testimony, which it would be useless to recapitulate, satisfies us that the mortgagees well knew of the intention of Goodrich to make an assignment at the time the mortgage was executed, and that the design of the parties to the instrument was to give the stepfather and mother a preference over other creditors in the conveyance he was about to make for their benefit."

No such case is presented here, as we read the testimony in this case. There is no testimony whatever which goes to prove a collusion between Doty and Ham. Nothing to show that Ham knew that Doty contemplated making an assignment, even if such knowledge would prevent Ham from legally securing his debt, a point not necessary to be decided in this case. Ham swears that he did not know that Doty thought of making an assignment, and that they had no conversation or understanding concerning that subject; and Doty swears to the same thing, and further, that he did not intend to make an assignment until the day after the mortgage was given, when he found he could not make an arrangement with Ham to "restock the store, and give him a chance to keep up the business." There is nothing unreasonable in this statement. Men who are in failing circumstances, and who are pressed to the wall by importunate creditors, are frequently compelled to change their minds, and adopt new plans very hurriedly. All that we can gather from the testimony is, that Ham was a little more industrious in securing his debt than the other creditors, and we think the law should protect him in the advantage he has secured by his superior diligence.

The mortgage in this case is the ordinary mortgage, with an oral agreement that the mortgagee should sell the mortgaged property, which was a stock of general merchandise, and apply the proceeds to the extinguishment of the debt. It is not questioned that the mortgage was given to secure a *bona fide* debt. The mortgage is, therefore, *prima facie*, valid, and is binding on all the parties: *Warren v. Creditors*, 3 Wash. 48; *Ephraim v. Kelleher*, 4 Wash. 243.

Judgment is reversed, and cause remanded, with instructions to enter judgment for defendant, with costs.

ANDERS, C. J., and STILES, SCOTT, and HOYT, JJ., concurred.

CREDITOR'S BILL — FILING OF BEFORE LEGAL REMEDIES HAVE BEEN EXHAUSTED: See note to *Quarl v. Abbett*, 52 Am. Rep. 673. A creditor may, without a judgment at law, have a fraudulent sale set aside under the stat-

ute of Mississippi: *Comstock v. Rayford*, 1 Smedes & M. 423; 40 Am. Dec. 102; and of Maine: *Brown v. Kimball Co.*, 84 Me. 492. And if a lien is obtained by attachment the creditor may file a bill without waiting for judgment and execution: *Conroy v. Woods*, 13 Cal. 627; 73 Am. Dec. 605; *Francis v. Lawrence*, 48 N. J. Eq. 508; but in such a case, as his right to a lien rests entirely on his own act, and not on a judgment, he is bound to show affirmatively that he is a creditor of the defendant, and also that, as a creditor, he has, in the mode pointed out in the attachment act, acquired the lien which he asserts: *Cocks v. Varney*, 45 N. J. Eq. 72.

ASSIGNMENT FOR BENEFIT OF CREDITORS. — LAWFUL AND UNLAWFUL PREFERENCES: See note to *Crawford v. Taylor*, 26 Am. Dec. 584-587. To illustrate some of the principles there discussed, the rulings of some recent cases are here summarized. In the absence of statutes forbidding preferences, every debtor has a right to prefer one or more of his creditors to the rest: *Patton v. Leftwich*, 86 Va. 421; 19 Am. St. Rep. 902; *Hage v. Campbell*, 78 Wis. 572; 23 Am. St. Rep. 422; *Matthews v. Lloyd*, 89 Ky. 625; *Dwight v. Scranton etc. Co.*, 67 Mich. 507; *Preston v. Carter*, 80 Tex. 388; *Mackellar v. Pillsbury*, 48 Minn. 396. Such preferred creditor may be the wife of the debtor: *Cornell v. Gibson*, 114 Ind. 144; 5 Am. St. Rep. 605; *Breneman's Estate*, 150 Pa. St. 494. Unless evidence to the contrary is given, the common-law rule as to the permissibility of a preference will be presumed to be in force in other states. Hence, although such a preference may be invalid under the law of the state in which it is attacked, it will nevertheless be upheld by the courts of that state if valid in the state where it was made: *Matthews v. Lloyd*, 89 Ky. 625; *Frank v. Bobbitt*, 155 Mass. 112. In some states a fraudulent preference will avoid the whole assignment: *Roberts v. Victor*, 130 N. Y. 585. In others it is held that the assignment is not annulled by an attempted preference: *Boyd v. Haynie*, 83 Tex. 7. The statutes, though differing somewhat in their details, seem to be everywhere worded so as to avoid preferences made in contemplation of insolvency or in the instrument of assignment itself: *Foreman v. Burnette*, 83 Tex. 396; *Brown v. Smart*, 69 Md. 320; *Roberts v. Victor*, 130 N. Y. 585; *King v. Gustafson*, 80 Iowa, 207; *Chickering v. White*, 42 Minn. 457; *Stites v. Champion*, 49 N. J. Eq. 446; *Shillito Co. v. McConnell*, 130 Ind. 41; *Lamar v. Pool*, 26 S. C. 441. Especially is this the case where the preferential assignment includes a provision that the surplus remaining after payment of the preferred creditors shall be restored to the assignor: *Sutherland v. Bradner*, 116 N. Y. 410; *Kendall v. Bishop*, 76 Mich. 634; *Farwell v. Cohen*, 138 Ill. 216. But a preference given by a deed of assignment to all creditors who shall, on or before a day and hour named, two months after the execution of the deed, "accept in writing the terms of the assignment, and in consideration thereof execute a release of their claim against" the assignor, does not violate the law against preferences: *Jaffray v. Steedman*, 35 S. C. 33. This case was decided under a statute expressly giving a priority to those creditors who should "accept the terms of the assignment, and execute a release of their claim" against the debtor; but the same court has held that a deed of assignment which provides for a distribution of the assigned estate only among such creditors as "shall accept under this assignment," is void, because, in effect it excludes nonaccepting creditors: *Clarke v. Baker*, 36 S. C. 420. Under the New York statute, the prohibition of preferences applies, not merely to those in the assignment itself, but also to those created by a separate instrument in contemplation of the assignment. All instrumentalities which the insolvent debtor, in contemplation of a general assignment volun-

plays to give a preference, are comprehended; *Berger v. Varrelmann*, 127 N. Y. 281, in which a confession of judgment, execution, and levy, just before a general assignment, were held fraudulent. Compare *Spelman v. Freedman*, 130 N. Y. 421.

It is probably a universal principle that, if the creditor knows, or has reasonable cause to believe, that the transaction by which he obtains a preference is consummated in contemplation of insolvency, the preference will be void: See cases cited at the conclusion of the note to *Crawford v. Thomas*, 26 Am. Dec. 587; *Chickering v. White*, 42 Minn. 457; *Goldworthy v. Roger Williams Nat. Bank*, 15 R. I. 586; *McCann v. Hill*, 85 Ky. 574; *Milliken v. Hathaway*, 148 Mass. 69. But in *Berger v. Varrelmann*, 127 N. Y. 281, the majority of the court were inclined to extend the principle, and intimated that a want of knowledge, on the part of the preferred creditor, that an assignment was contemplated, will not avail to validate a preference falling within the terms of the statutory prohibition — a ruling, or rather expression of opinion, which is inconsistent with the remarks of the same court in *Manning v. Beck*, 129 N. Y. 1. To invalidate the assignment, however, it is not enough that the creditor suspects the insolvency of the debtor; he must have actual knowledge of the insolvency, or of facts sustaining a reasonable belief that the insolvency exists. Nor will knowledge acquired after he receives the preference invalidate it: *Goldworthy v. Roger Williams Nat. Bank*, 15 R. I. 586. The general rule being that a debtor may, while retaining dominion over his property, and not contemplating an assignment, use his property in discharge of his liabilities, and pay one or more creditors to the exclusion of the others: *Hanchett v. Gardner*, 138 Ill. 571. It is often an essential question whether the transaction impugned amounts to an assignment. Such will be its effect, not only if it is actually what the law regards as an assignment for the benefit of creditors, though it may not purport to be such: *King v. Gustafson*, 80 Iowa, 207; *Stites v. Champion*, 49 N. J. Eq. 446; but also where the transaction giving the preference, and the subsequent assignment are so connected together that they must be deemed one continuous act: *Wyeth H. Co. v. Standard I. Co.* 47 Kan. 423; *Cleveland Co-operative Stove Co. v. Wilson*, 80 Iowa, 697. On the other hand, as long as no assignment is in fact made, or the transaction does not amount in law to such an assignment, an insolvent debtor is at liberty to pay or secure any of his creditors at the expense of the others: *Sheldon v. Mann*, 85 Mich. 265; *Butler v. Diddy*, 83 Iowa, 533; *Hershiser v. Higman*, 31 Neb. 531; 28 Am. St. Rep. 527; *First Nat. Bank v. Ridenour*, 46 Kan. 718; 26 Am. St. Rep. 167; and if the transaction attacked is separate in point of time, and not connected by intention or circumstance with an assignment subsequently made, it will be upheld: *Letts v. McMaster*, 83 Iowa, 449; *Rock Island Plow Co. v. Breese*, 83 Iowa, 553. Nor does it signify how short the interval of time may be, which separates the transaction giving the preference from the assignment, provided the debtor is acting in good faith: *Carnahan v. Schwab*, 127 Ind. 507. Thus a *bona fide* confession of judgment, made a few days before the assignment, is valid: *Breneman's Estate*, 150 Pa. St. 494. So in *De Ford v. Nye*, 40 Kan. 465, chattel mortgages given in the forenoon were sustained against a general assignment made in the afternoon of the same day. Since a preference given on good consideration is always lawful: *Nordlinger v. Anderson*, 123 N. Y. 544, an instrument giving a preference, partly to secure a pre-existing debt, and partly to secure a debt created simultaneously with the execution of the instrument, will be valid as to the latter debt and void as to the former: *McCutcheon v. Caldwell*, 90 Ky. 249.

WILSON v. BEYERS.

[5 WASHINGTON, 303.]

MUNICIPAL CORPORATIONS HAVE THE RIGHT TO RESTRAIN CATTLE FROM RUNNING AT LARGE under the provisions of an ordinance passed in conformity with a grant of legislative authority for that purpose. The passage of such an ordinance is a valid exercise of the police power, and is not violative of any constitutional prohibition.

MUNICIPAL CORPORATIONS — ORDINANCES TO RESTRAIN CATTLE FROM RUNNING AT LARGE. — Proceedings under an ordinance passed for the purpose of restraining cattle from running at large on the streets of a town are proceedings *in rem*, which attach no personal liability to the owner, and therefore constructive service of process by publication is sufficient to sustain a judgment disposing of the subject-matter.

MUNICIPAL CORPORATIONS, POWERS OF. — A municipal corporation is an inferior body, and has no other powers than those which have been expressly delegated to it and their appropriate incidents.

STATUTES, CONSTRUCTION OF — EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS. — A clause in a statute which confers upon all cities the power "to make such ordinances, etc., not inconsistent with the constitution of the state as may be deemed expedient to maintain their peace, good government, and welfare," may, when taken by itself, be construed as conferring by implication upon every city the right to restrain animals from running at large. But if the same statute divides the cities of the state into four classes, and expressly confers upon the second and third class the right of so restraining animals, and is silent as to the exercise of the right by cities of the fourth class, and it also appears that it was the evident intention of the legislature to confer many powers upon the larger cities which were withheld from the smaller ones, the inference must be that there is no implied grant of the right in question to cities of the fourth class.

George Bradley, for the appellant.

Pendergast and Malloy, for the respondent.

DUNBAR, J. This cause was submitted to the court on an agreed statement of facts which involved the validity of a certain town ordinance of the town of Waterville (a town of the fourth class), providing for the impounding and sale of cattle running at large upon the public streets of said town. Plaintiff brought his action in replevin for certain cattle sold by defendant, and said to be unlawfully detained by respondent, who, as city marshal of said town of Waterville, seized the cattle under the provisions of said ordinance. Defendant moved for judgment upon the agreed facts, and judgment was rendered upon said motion in his favor, and plaintiff appeals.

The contention of the appellant is that the ordinance in question is void for two reasons: 1. That it is in violation of

section 3, article 1, of the Constitution of the state of Washington; 2. That said ordinance is invalid because the said town had no authority under the statute to pass it.

So far as the first proposition is concerned, there can be no doubt that the overwhelming weight of authority is opposed to the contention of appellant, and that the right to restrain cattle from running at large, under the provisions of the ordinance passed in conformity with the grant of such power by the legislature, is a valid exercise of police power, and is not violative of any constitutional provision. Such power has been conferred on municipal corporations from time immemorial, and is founded on public necessity, protection of public health, safety, and comfort; and but few courts have questioned its validity. There have been many contentions over the reasonableness or unreasonableness of the notice given by the provisions of the ordinance, and many decisions holding the notice unreasonable, but they did not go to the right of the city to pass an ordinance of this character. In other cases the ordinance provided for the collection of the damages which the stock may have done, and some courts have decided that the question of damages should be submitted to a jury. This was the question decided in *Bullock v. Geomble*, 45 Ill. 218, cited by appellant. In *Willis v. Legris*, 45 Ill. 289, cited by appellant on this point, the question of a penalty was involved which is not involved in the case at bar.

Sustaining the validity of this and kindred ordinances, we cite: Dillon on Municipal Corporations, 4th ed., secs. 808, 850; Cooley on Constitutional Limitations, sec. 588; *McKee v. McKee*, 8 B. Mon. 433; *Jarman v. Patterson*, 7 T. B. Mon. 644; *Brower v. Mayor etc.*, 3 Barb. 254; *Milhau v. Sharp*, 17 Barb. 435; *Van Wormer v. Mayor etc.*, 15 Wend. 262; *Mayor etc. v. Lanham*, 67 Ga. 753; *Commonwealth v. Bean*, 14 Gray, 52; *Brophy v. Hyatt*, 10 Col. 228; *Spitler v. Young*, 68 Mo. 42; *Folmar v. Curtis*, 86 Ala. 354; 10 Am. & Eng. Ency. of Law, 187, and cases cited.

So far as the question of notice is concerned as not being due process of law, proceedings under the ordinance are proceedings *in rem*. It is only the property that is dealt with; no personal liability attaches to the owner, and in an action *in rem* constructive service by publication is sufficient to give validity to the judgment obtained.

The second proposition, however, is more troublesome.

The statute does not in express terms grant the power to the city council of cities of the fourth class to pass ordinances for the impounding of cattle or other stock, or to restrain them from running at large within the city limits. The question then is, has this power been conferred by necessary implication? As a general proposition, it may be said that the city corporation is an inferior body, and has no other powers than those which have been expressly delegated to it, and their appropriate incidents; but what the appropriate incidents of expressly conferred powers are is a question exceedingly difficult to determine, and one which has provoked the announcement of many conflicting opinions by the courts; and the text writers, while assuming to lay down rules for the construction of the statutes in such cases, leave the meaning of the rule so clouded as to render it of little assistance to the courts. Thus in *Horr and Bemis on Municipal Police Ordinances*, it is announced, in section 18, as follows: "The charter or statute granting powers to municipal corporations usually enumerates those which may be exercised. It is a general rule that all powers not mentioned in the enumeration, and not incidental to those enumerated, are not intended to be included in the grant. All other powers are impliedly excluded." All the force of the rule of construction thus laid down is, however, annulled by the following proviso: "But the enumeration of special cases does not, unless the intent be apparent, exclude the implied power any further than necessarily results from the nature of the special provisions." These oracular announcements, when construed together, contain no rule of construction whatever.

The rule of strict construction against the corporation is, however, thus laid down by Judge Dillon in his work on *Municipal Corporations*, sec. 89, and notes: "Corporate power being delegated must be strictly construed and plainly conferred. Whenever a genuine doubt arises as to the right to exercise a certain power, it must be resolved against the corporation and in favor of the general public. This rule is most strictly observed in construing powers that may lead to an infringement of personal or property rights."

In *Smith v. Madison*, 7 Ind. 86, it is held that the application of the above rule could not be made to defeat the right to exercise powers which are incidental to the good government of the community. In *City of Waco v. Powell*, 32 Tex. 258, under the provisions of the statute granting to a city

government general control over the streets, similar to the provisions of our statutes relating to cities of the fourth class, it was held that such power authorized the enactment of an ordinance for the impounding of cattle; and it was further held that the authority to pass such an ordinance existed not only under the general powers granted, but by reason of the power granting control of the public streets to the city. "The right of individuals," said the court, "to convert the public streets into a hog, cow, or horse ranch, by allowing or compelling their stock to run there, cannot exist compatibly with the right of the board of aldermen to control the same streets. The two rights are inconsistent, and cannot exist together." The same doctrine is stated in several other cases. While other courts have gone still further, and held that under a general legislative provision that, "the city or town shall have the right to make all necessary laws not repugnant to the laws of the state," such city has power to pass ordinances to restrain cattle from running at large: *Commonwealth v. Bean*, 14 Gray, 52; while many other courts have held that such power could not be legally implied: *Varden v. Mount*, 78 Ky. 86; 39 Am. Rep. 208; *Collins v. Hatch*, 18 Ohio, 523; 51 Am. Dec. 465.

It is pretty well conceded by the authorities that the term "general welfare," used in legislative grants of power to municipal corporations, is of broader scope and confers greater powers on corporations than such expressions as "peace and good order" and "peace and good government," and that many things are essential to the public welfare which belong neither to the preservation of peace and good order nor to the exercise of good government. The general authority conferred by our statute is as follows: "To make all such ordinances, by-laws, rules, regulations, and resolutions not inconsistent with the constitution and laws of the state of Washington as may be deemed expedient to maintain the peace, good government, and welfare of the town, and its trade, commerce, and manufactures, and to do and perform any and all other acts and things necessary or proper to carry out the provisions of this chapter."

So that it will be seen that the statute not only contains the "peace and good government" provision, but also contains the "general welfare" provision, for the word "welfare" is fully as comprehensive as the term "general welfare." And under this provision we might be constrained to give it the

liberal construction contended for by respondent were we called upon to construe the powers granted to any particular city independent of its relations to any other provisions of the statute. But under our law cities are divided into four classes, and their organization, classification, incorporation, and powers are all provided for in one act, and to arrive at the intention of the lawmakers the act must be construed together. It will be observed from the perusal of the act that the same general powers are granted to cities and towns of the third and fourth class as are granted to cities of the second class, yet the statute expressly confers upon cities of the second and third class power to prevent and regulate the running at large of any and all domestic animals within the city limits, while this power is not specified in the specific grants of power to cities of the fourth class. It also appears that many other powers are granted to large cities which were not granted to the smaller ones, and it was the evident intention of the legislature to confer many powers on the larger cities which were withheld from the smaller ones. Considering the act together, as we must, we must conclude that this provision being made as to one class of cities, and not as to the other, it was not the intention of the legislature to confer the power by implication, and that the ordinance is therefore invalid.

The judgment is reversed.

ANDERS, C. J., and STILES, SCOTT, and HOYT, JJ., concur.

ANIMALS RUNNING AT LARGE, STATUTES AND ORDINANCES RESPECTING:
See notes to *Campau v. Langley*, 33 Am. Rep. 416; *Stewart v. Hunter*, 8 Am. St. Rep. 271; *Juliens v. Mayor etc. of Jackson*, 69 Miss. 34; 30 Am. St. Rep. 526. The last-named case holds that an ordinance that unmuzzled dogs running at large shall be killed is valid. In *Burdett v. Allen*, 35 W. Va. 347, an ordinance was upheld which provided for taking up and impounding certain animals found running at large in the public streets during the night, and for selling them to pay charges for impounding, etc., without judicial inquiry or determination, upon notice being given to the owner. So in *Brophy v. Hyatt*, 10 Col. 223, it was ruled that an ordinance providing for a notice of sale and the payment of the proceeds of the sale of an impounded animal to the owner, after deducting the costs of the proceeding, cannot be considered as declaring or working a forfeiture of the animal, or as in conflict with the constitution. A city, under an ordinance empowering it to "tax, regulate, etc., the running at large of dogs," may impose a *per capita* tax upon dogs by way of license: *City of Carthage v. Rhodes*, 101 Mo. 175. For a discussion of the power of cities to enact ordinances, see note to *Robinson v. Mayor*, 34 Am. Dec. 627-643.

SCOTT v. McNEAL.

[5 WASHINGTON, 309.]

ADMINISTRATION ON ESTATE OF LIVING PERSON, WHEN VALID. — A probate court has jurisdiction to appoint an administrator for a missing person's estate, if the proceedings are based upon a sufficient petition and proper notice of the hearing thereof is given by publication, and it is satisfactorily proved that such person has not been heard of for more than seven years. In such a case the missing person, if he afterwards returns, cannot maintain an action of ejectment against the grantee of one who has purchased a portion of the estate at an administration sale for which an order has been duly made.

N. S. Porter and Byron Millett, for the appellant.

Root and Mitchell, for the respondents.

SCOTT, J. This was an action of ejectment brought by appellant against the respondents to recover possession of certain lands in Thurston County. The defendants claim the same under a deed from Samuel C. Ward, who had purchased the land at an administrator's sale. In March, 1881, the appellant, who was at that time a resident of Thurston County, in this state, then territory, mysteriously disappeared. At that time he was the owner of the lands in question, the same being subject to a mortgage given to one T. F. McElroy. After a lapse of over seven years one Mary Scott, who claimed to be a creditor of the appellant, filed a petition in the probate court of said county, alleging the fact of Scott's disappearance more than seven years previously, and that careful inquiry made by his relatives and friends at different times since said disappearance had failed to give any knowledge or information of his whereabouts, or any evidence that he was still living; and alleged that she verily believed him to be dead, and that he had died at the time of his disappearance; that he was never married, and left no last will or testament; and that he left real estate (being the land in controversy) in Thurston County. She also named several minor children of his deceased brother as his heirs; that she was a creditor, etc., and prayed for an administration of his estate. A notice of the hearing of said petition was given, and upon the day set for the hearing witnesses were examined and the court found from said testimony that said Scott was dead, and appointed an administrator as prayed for.

A number of objections are raised to the probate records, some of which go to the jurisdiction of the court relating to

the sufficiency of the petition, and the posting of notices. Appellant alleges that the petition was defective in that it did not state that said Scott was a resident of Thurston County at the time of his death. The allegation in the petition is: "That one Moses H. Scott, heretofore a resident of the above-named county and territory (Thurston County, Washington Territory), mysteriously disappeared some time during the month of March, A. D. 1881, and more than seven years ago." We think this was sufficient, as the word "heretofore" should be held to relate to the time of his disappearance.

He also objects to the proof of the posting of notices because it appears from the affidavit of the person posting the same that he had posted three of the notices in three public places in Thurston County, as the law required, without stating where they were posted. At the hearing, however, the court found that due notice of said hearing had been posted in three public places, as required by the statute, and we think the petition, notice, and proof were sufficient to give the probate court jurisdiction.

The estate was administered step by step down to a sale of the lands to said Ward, and the records were introduced in evidence against numerous objections made by the appellant. These objections, however, were mainly aimed at irregularities in the proceedings, which did not affect the jurisdiction of the court, and appellant was not in a position to take advantage of them in a collateral action. In addition to the records of the probate court in said matter, a deed from Ward to defendants was also admitted in evidence.

Appellant was a witness in his own behalf, but he made no attempt to explain his manner of leaving or his absence.

The defendants, after purchasing the property, took possession of it, and made valuable improvements. They stand in the position of innocent purchasers, and the question is, under this peculiar condition of affairs, which one of the parties must suffer? The equities of the case seem to be clearly with the defendants, for, as the matter appears, appellant willfully abandoned the property in question, and he certainly had reason to expect that proceedings of the kind would be instituted after a lapse of years, in case his relatives, and other interested parties, should not be able to obtain any information of his existence or whereabouts.

It is argued, however, that to give effect to these probate

proceedings, under the circumstances, would be to deprive him of his property without due process of law. The question is a very interesting one. It has been passed upon by other courts, and the decisions are conflicting. The action of the lower court in this instance is sustained by the case of *Roderigas v. East River Sav. Inst.*, 63 N. Y. 460; 20 Am. Rep. 555. This case has received much adverse criticism, and also some favorable comments. The appellant argues that it would be inapplicable here, because, under the New York statutes, the court, in an application for letters of administration, had authority to find the fact as to the death of the intestate, while under the laws of this territory this was not a matter in issue. But we are unable to agree with him. Our statutes only authorize administration of the estates of deceased persons, and before granting letters of administration, the court must be satisfied by proof of the death of the intestate. The proceeding is substantially *in rem*, and all parties must be held to have received notice of the institution and pendency of such proceedings, where notice is given as required by law. Sec. 1299 of the 1881 Code gave the probate court exclusive original jurisdiction in such matters, and authorized such court to summon parties and witnesses, and examine them touching any matter in controversy before said court, or in the exercise of its jurisdiction.

We are of the opinion that it would serve no good purpose to undertake a review of the various cases and criticisms bearing upon this subject, but content ourselves with a reference to Woerner's American Law of Administration, secs. 210, 211, and authorities there cited.

Under the circumstances of this case, and after the best examination we have been able to give the matter, we are inclined to follow the case of *Roderigas v. East River Sav. Inst.*, 63 N. Y. 460; 20 Am. Rep. 555.

The judgment of the court below is affirmed.

ANDERS, C. J., and DUNBAR, HOYT and STILES, JJ., concur.

ADMINISTRATION ON ESTATE OF LIVING PERSON. — Letters of administration on the estate of a living person are absolutely void: *Devlin v. Commonwealth*, 101 Pa. St. 273; 47 Am. Rep. 710; *Thomas v. People*, 107 Ill. 517; 47 Am. Rep. 458, and note; *Melia v. Simmons*, 45 Wis. 334; 30 Am. Rep. 746; *D'Arusment v. Jones*, 4 Lea, 251; 40 Am. Rep. 12; whether the administration be granted on direct evidence of death, or on the presumption arising from the fact of absence, unheard of for seven years: *Moore v. Smith* 11 Rich. 569; 73 Am. Dec. 122.

STATE v. BALL.

[5 WASHINGTON, 337.]

CONTEMPT, JUDGMENT FINDING PERSON GUILTY OF, WHEN VOID. — The service of a summons, in an action against a corporation, upon one of its officials in his representative character is merely for the purpose of bringing it into court, and does not make him a party to the action in such a sense that he can, without further process be adjudged liable to the penalties of contempt for failing to deliver to the receiver appointed to take charge of the corporate property a portion of that property which he had in his possession before the commencement of the action.

R. B. Lehman and B. F. Heuston, for the appellant.

Doolittle and Fogg, for the respondent.

ANDERS, C. J. The learned judge who tried this cause seems to have proceeded upon the theory that the judgment rendered in the case of *Lorenz v. First Bank of Orting* was binding upon the appellant, to the extent at least of authorizing the court to include therein the order complained of simply because the appellant was, at that time, an officer of the defendant corporation.

This is, we think, an erroneous conception of the law applicable to the case. The appellant was not a party to that action, was not served with process therein, and no relief was asked as against him. The mere fact that the summons was served upon him as a representative of the defendant for that purpose did not make him a party to the action. Such service was for the purpose of bringing the defendant bank into court, and for that purpose and no other it was effectual: *Ex parte Hollis*, 59 Cal. 405. .

By what authority, then, did the court adjudge that the appellant wrongfully took the securities in question from the safe of the defendant, prior to the commencement of the action, and that he should return them to the receiver? Obviously the court had no such authority, and the order was therefore void.

It is true that property in the possession of a receiver is deemed to be in the custody of the court and anyone who, with notice of the receiver's appointment, in anyway interferes with his possession is liable to punishment as for a contempt of court: *Beach on Receivers*, sec. 245. But the receiver takes only the property the defendant has at the time. If he finds property belonging to the defendant, not in his possession or under his control, but in the possession of a third per-

son who refuses to deliver it upon demand, he must either proceed by action in the ordinary way to try his right to it, or the plaintiff should make such third person a party to the action, and apply to have the receivership extended to the property in his hands, so that an order for the delivery of the property may be made which will be binding upon him, and which may be enforced in a summary way by process of contempt, if not obeyed: *Beach on Receivers*, sec. 216.

In this case the evidence shows clearly that the notes, at the time appellant was ordered to deliver them to the receiver, and also at the time he was adjudged guilty of a contempt of court and committed to prison for failing to comply with the order, were in the custody of the National Bank of the Republic, and by it held as a pledge to secure the payment of an indebtedness from the defendant in the original action. And this fact being undisputed, it follows that appellant would have been excused for not delivering them to the receiver, even if the order to do so had been a valid one: *Register v. State*, 8 Min. 214.

We are of the opinion that the judgment in this proceeding is neither supported by law nor warranted by the evidence. It is therefore reversed and the appellant discharged.

SCOTT, HOYT, STILES and DUNBAR, JJ., concur.

CONTEMPT. — The case of *Tolleson v. People's Sav. Bank*, 85 Ga. 171, is, in some respects, similar to the leading case. In that case the receiver appointed by the court applied for an order requiring the president of the insolvent corporation to show cause why he should not be attached for contempt, in not delivering the assets of the corporation to such receiver in obedience to a previous order of the court directed to the corporation. The president appeared as an individual, and responded under oath, and took part in the proceedings. It was held that the court had such jurisdiction of him as would authorize it to deal with him for contempt in not turning over to the receiver the assets of the corporation in his possession.

NUHN v. MILLER.

[5 WASHINGTON, 405.]

HUSBAND AND WIFE — WIFE, WHEN ESTOPPED FROM CLAIMING HER SHARE OF COMMUNITY PROPERTY. — If a husband, after separating from his wife, comes to this state and conducts himself as a single man, the wife, meanwhile, making no effort and showing no desire to assert her rights as a spouse, the community relationship will be deemed to have been abrogated as to persons here who deal with the husband in good faith, and on the assumption that he is unmarried, and the wife will be estopped from asserting a claim to land which her husband has bought with money earned since the separation, and has afterwards conveyed to an innocent purchaser.

Taylor and McKay, and T. W. Hammond, for the appellants.

Van Fossen and Ramage, for the respondents.

SCOTT, J. This was an action brought to quiet title to certain lands in Pierce County. The defendant, Charles Miller, had executed a deed some years before purporting to convey said lands to certain parties, and the same were deeded by them to other grantees, and finally to the plaintiffs. Miller had represented himself as a single man at the time he executed the deed, but the defendant, Elizabeth Miller, subsequently appeared, claiming to be his wife, and that the lands were community lands, and that she had a community interest therein. Whereupon the plaintiffs brought this action.

The defendant, Charles Miller, originally lived at Harrisburg, Pennsylvania, at which place, in the year 1858, he was married to the defendant, Elizabeth Miller. He was known there by the name of Conrad Miller, his name being Charles Conrad Miller. Six children were born to them, all of whom were living at the time of the trial. From Harrisburg, Miller and his family moved to Pittsburg, in January, 1873. In the spring of 1874, Elizabeth Miller took their children and returned to Harrisburg, Miller continuing to reside at Pittsburg until some time during 1877, when he removed to California, and remained there until 1879, when he moved to Oregon, and from there to Washington Territory, and he has resided here since the spring of 1880. The facts concerning the separation of the defendants, Charles and Elizabeth Miller, or what facts led up to it, do not fully appear in the testimony. Miller says he was advised by a physician to allow his wife to return to Harrisburg, because she was homesick, and that

he did so upon that account. He testified that they kept up their relations as husband and wife until 1879, although he had removed from Pennsylvania in 1877. When asked why the relations ceased at that time, he said he had been informed that she was dead, and he did not know differently until May, 1890, when he learned that it was her mother who died. It seems that no correspondence was kept up between the parties, and there is every indication that they regarded their separation as a permanent one.

In October, 1885, Miller was married in this territory to one Mary Smith, and has one child by this marriage. He was subsequently divorced from this woman, in the district court holding terms in and for Pierce County, and, in February, 1888, he remarried her. She died prior to the commencement of this action.

When Miller left Pennsylvania for the State of California he took twenty-seven thousand dollars in money with him. He lost thirteen thousand dollars in California, and met with some losses thereafter. And it appears by his own testimony that none of this twenty-seven thousand dollars was invested in this land, but that he purchased the same with money he earned after coming to Washington Territory.

The circumstances connected with this case are somewhat remarkable. They are highly inconsistent with the claims of defendants at this time, that they never intended to abandon each other, but considered themselves husband and wife; Elizabeth always, and he, until he learned of her death, as he supposed, in 1879. There is nothing to show that Miller ever had any word from his wife or family, after he left Pennsylvania, until some years after he had sold the lands in question, at which time he says he requested some person to make inquiries in the vicinity where they had previously resided. Upon such inquiries being made, he learned that she was still living. It does not appear that any attempt was made by either of the parties to keep any track of each other, or to know anything of each other's subsequent life or existence, and in spite of every attempt now to make it appear that their separation was a harmonious one, with the intention of reuniting, the fact still stands prominently before us that they regarded their separation as final.

It seems that his son, Charles A. Miller, informed his mother, Elizabeth, of the sale of this land in the fall of 1890, whereupon she stated that she would claim an interest in it

if she could do so, and from this time dates their subsequent communication with each other.

The law would be very faulty indeed, if, under the facts of this case, a claim of this kind could be set up and made to prevail against innocent purchasers, and the plaintiffs in this action stand in that position. No neglect or bad faith can be imputed to them. They had every reason to believe that Miller was a single man at the time the conveyance was made, and had no knowledge whatever of the existence of Elizabeth Miller or of his having been married to her.

Certainly the statutes relating to the disposal of community lands, and the community property laws, were not intended to protect or aid the members of the community in any transaction of this kind, or to place them in a position to defraud innocent purchasers.

I indorse the views expressed by Hoyt, J., in his concurring opinion in *Sadler v. Niesz*, 5 Wash. 182, in this particular, and in this case it should be held that the community relationship between these parties was not in existence as to third persons, acting in good faith, at the time Miller came to Washington Territory, and that it was never subsequently in force prior to the conveyance of the land to these plaintiffs. Here the husband and wife had separated, and the community relationship, if it could be held to have ever existed, had become abrogated or suspended by their own voluntary acts. The conduct of Elizabeth in separating from her husband, and remaining separated from him as she did, without any effort or desire apparently to assert any of her marital rights, thus placing him in a position where he could palm himself off as a single man, should be held as in effect saying to other people, having no knowledge of the facts, that they might deal with him as a single man.

Under such circumstances, and in accordance with equitable principles, she is estopped from now asserting any claims to the land in question as against these plaintiffs.

The decree of the court below is affirmed.

ANDERS, C. J., and HOYT, J., concur.

STILES, J. I concur for the reasons given in *Sadler v. Niesz*, 5 Wash. 182.

DUNBAR, J. Having wantonly abrogated the marriage relation, I think the wife should be estopped from claiming

against those who were led by her own acts to deal with her husband as a single man. I therefore concur in the result.

ON REHEARING.

SCOTT, J. This case was formerly before this court, and a decision was rendered affirming the decree of the lower court. A petition for a rehearing was filed as to one of the minor questions raised by the appellants. It was contended that there had been no cause of action established against the defendant Edward W. Taylor, and that said cause should have been dismissed as to him, which the lower court refused to do. A rehearing was granted, and upon further argument of the cause it is conceded by the respondents that such action should have been dismissed as to such defendant. Consequently the decision heretofore rendered by this court will be modified to the extent of directing a dismissal of said action as against the defendant Edward W. Taylor, but in all other respects such judgment is affirmed, and allowed to stand as previously directed.

DUNBAR, C. J., and HOYT, ANDERS, and STILES, JJ., concur.

THE circumstances in *Sadler v. Niesz*, 5 Wash. 182, were very similar to those of the principal case. One Sadler, after living with his wife in Pennsylvania for about eight years, left her and went to the Pacific Coast. For about fifteen years his wife and family remained in the east, unknown to any of his associates and companions in the west. To his friends and neighbors and to purchasers, not only of the land the title to which was in question, but of other land which he acquired and afterwards conveyed, he represented that he was a widower, and his statements were generally believed and acted upon. The land in litigation was conveyed by several deeds. In the body of some of them he stated that he was an unmarried man, while in the acknowledgment of others the same fact was recited, the officers before whom the deeds were acknowledged having relied on his representations. The defendant, Niesz, took the conveyances of the land without any notice or suspicion that Sadler's assertions as to his being unmarried were not true.

The trial court found that Sadler was estopped by his representations and warranties from asserting a claim to the land; that Mrs. Sadler was estopped by her remaining away from the territory, whereby knowledge of her relation to her husband by people who were likely to deal with him was suppressed, and by her silence, when she might have let it be known in the community where Sadler resided that he was a married man; and that Blake and Worthington, two grantees to whom the same land had been conveyed after the reunion between Sadler and his wife, received their pretended deeds after the estoppel and with knowledge of the rights of Niesz. The supreme court were unanimous that the judgment rendered in accordance with these findings should be affirmed, but a constitutional majority was unable to agree upon any one ground which should be assigned to sustain it.

The affirmance was therefore ordered, and the several members of the court proceeded to give their reasons for the action taken.

Stiles, J., said that the case of the plaintiffs rested upon the existence of a supposed principle that, "the legal title to community property is in both husband and wife, or that, more correctly, it is in the community, which is composed of the husband and wife." From this principle they drew the inference that until the community acted there could be no conveyance of land belonging to the community. An instrument by which one of the spouses undertook to convey such land would therefore be utterly void, and raise no estoppel even against the grantor himself. The learned judge proceeded to analyze this theory in the light of the various authorities in Washington and other states. After admitting that *Holyoke v. Jackson*, 3 Wash. (Ter.), 235, gave some countenance to the plaintiffs' contention, he remarked that *Zimpelman v. Robb*, 53 Tex. 274, fully supported their theory, but was no longer law in Texas, citing *Edwards v. Brown*, 68 Tex. 329; *Patty v. Middleton*, 82 Tex. 586. *Wooters v. Feeny*, 12 La. Ann. 449, was said to be to the same effect as the later Texas cases. *Holyoke v. Jackson*, 3 Wash. (Ter.), 235; *Andrews v. Andrews*, 3 Wash. (Ter.), 286; *Hoover v. Chambers*, 3 Wash. (Ter.), 26, were distinguished from the case before the court by the element of knowledge on the part of the person contracting with the husband that he was a married man. Nor, it was thought, did the Washington statute lend any support to the theory of a joint or community ownership of the title. Nowhere in that act or in any law ever passed in the territory on the subject was there any attempt to define or constitute a "community," or to declare of whom or what it should consist, or what its rights or liabilities were; with the single exception of its use with the word "debts," the word "community" was everywhere employed merely as an adjective to qualify "property," just as the word "separate" was employed to qualify other property. Previous to 1879 the word "common" had been used where now they had the word of four syllables.

The Code of 1881, section 2409, said that property "acquired" after marriage by either husband or wife or both was community property. There was no recognition in that language of a "community" which could "acquire"; not even when both husband and wife "acquired." He then pointed out that his views as to this question of legal title were supported by the language of the Washington statute of March 9, 1891, and also by the policy of the recording acts, which was to "render safe and certain every investment made in land by one who paid due heed to the public records, and had no actual notice of antecedent conveyances or equitable claims." The learned judge then made the following remarks upon the objects which the statute was supposed to secure: "The statute, as I take it, was passed for the purpose of enabling the wife to protect herself against reckless, improvident, or fraudulent sales by the husband. It prohibits all sales made by him alone, but no penalty is attached, and no declaration is made that his sole deed shall be invalid or void. He is simply prohibited, and doubtless, as between him and her and every person taking his deed, while fairly chargeable with notice of his married condition, she would be entitled to relief. But is it to be adjudged that it was the intention of this law that, under all circumstances, a purchaser in good faith from the husband, or the wife either, if the legal title should be in her, is the warrantor of his own title, and must lose everything on the hazard that his grantor is not a married person? Is it to be sustained in equity as a cover for frauds and swindlers who must, in the nature of things, be either men or women capable of

being married? Can this husband, with the lie that he is unmarried on his lips, and the money of Niess in his pocket, turn round and sue to recover the land which he sold? Can the woman who has such a husband maintain that every consideration is subordinate to her rights, and, in such a suit, not only protect herself, but take away from a purchaser who had been purposely thrown off his guard as to her existence, the property which, under all other circumstances, would be decreed to be his? Surely not, unless there be some imperative reason therefor."

It was then said that an examination of the decisions cited to support the plaintiff's position, that conveyances of community property by one spouse were "absolutely void" would show that, in almost all of them "voidable" was what was meant, and reference was made to the rule of construction, under which an act pronounced by a statute to be void is sometimes held merely voidable, citing *Terrill v. Auchauer*, 14 Ohio St. 80; *Van Shaack v. Robbins*, 36 Iowa, 201; *Bennett v. Mattingly*, 110 Ind. 197; Endlich on Statutes, secs. 269, 270. Some Washington cases were then noticed, and said not to be in point: *Littell etc. Co. v. Miller*, 3 Wash. 480; *Ryan v. Ferguson*, 3 Wash. 356; *Brotton v. Langert*, 1 Wash. 73. The inferences deduced from the examination of the statutes and the authorities by the learned judge were that the interest of Mrs. Sadler was an equitable and not a legal interest; that Mr. Sadler's deed was not void, but voidable only; and that the doctrine of estoppel was free to operate against, and justly applicable to, all the plaintiffs.

Anders, C. J., concurred, but delivered no opinion. Scott, J. concurred, on the ground that the wife was estopped under the peculiar circumstances of the case from making any claim to the land as against an innocent purchaser, and at the same time he expressed a doubt whether the statute relating to the disposal of community lands by the husband should be held to apply where the wife had not become a resident of the state prior to the conveyance.

Hoyt, J., while agreeing with much that was said by Judge Stiles, found himself unable to agree with that part of his opinion in which it seemed to be held that the spouse in whose name the community property was standing could dispose of the same without the other spouse joining in the conveyance, even though the two spouses were living together as husband and wife, and thus combatted this doctrine: "It was the intention of the legislature to prevent a husband from disposing of the real estate of the community in fraud of the rights of his wife. If, therefore, we hold, as stated in the opinion above referred to, it seems to me that it will open the door which the legislature thus intended to close. If it is held that the husband, while living with his wife, can alone convey such property standing in his name to anyone purchasing the same in good faith, without knowledge of the existence of the wife, there will be nothing to prevent a fraudulent arrangement as between the husband and a purchaser, by which it will be made to appear that such purchaser acted in good faith, when in fact he acted with full knowledge of all the circumstances. A designing and unscrupulous husband would thus be enabled to nullify the intention of the legislature." On the other hand, the possible mischief of construing the statute so that when property was acquired by the husband, — not by gift, devise, or bequest, — it at once became the property of the community, regardless of the question whether or not he and his wife were living together, was equally serious. A repeated use of the privilege of setting aside conveyances made by the husband without the concurrence of his wife, might, un-

der such a construction, enable a pair of dishonest spouses to acquire, by an investment of a few thousand dollars, property worth, perhaps, hundreds of thousands. The legislature could not have intended to provide machinery for such fraudulent transactions, but rather, as it appeared to the learned judge, "to create a community as between the husband and wife for the purpose of holding such property"; and he also thought that, "in the conveyance of such property to either spouse, a bare legal title therein is vested in such spouse, but that the entire beneficial interest is vested in the community, and an absolute prohibition is placed upon the spouse in whose name the title happens to stand, which prevents any title whatever being passed by that spouse alone, so long as the community lasts."

The nature of a community is then discussed: "As between the two spouses," it was said, "such community exists, whenever they occupy the relation of legal husband and wife, regardless of the fact as to whether or not they are living together. But such relation alone does not constitute the husband and wife a community as between them and third persons, who have no knowledge of the existence of such relation, or of any facts which should have put them on inquiry as to what were the relations of the spouses, or either of them. There must, in my opinion, be such an assertion of his or her rights by each of the spouses, as are ordinarily and reasonably to be expected from the fact of the existence of such relation, or else the community does not exist, so far as the public having no knowledge of the legal relation of husband and wife are concerned. If either of the spouses sees fit to allow the other spouse to act and represent him or herself as a single person under such circumstances, and for such a time as would induce persons of reasonable prudence, with whom such spouse associated, to believe that he or she was in fact a single person, then I think that so long as this state of facts exists, there is no such community existing between the spouses as was contemplated by the legislation upon the subject of the conveyance of community property." The learned judge admitted that this construction of the statute would often enable an unscrupulous husband to dispose of property in fraud of his wife's rights, but considered that if either a member of the community, or a third person, must suffer without fault on the part of either, good conscience and well-established rules require that it should be a member of the community. To a certain extent each member of the community was to be held to be an agent of the community, and the public had a right to demand that there should be something more than the legal relation of husband and wife, before it was bound to recognize a community between the persons occupying such a relation. The learned judge summed up as follows: "In my opinion, so far as the public is concerned, such a relation, i. e., community, cannot be held to exist without the concurrence of two facts: 1. The marriage relation between the members of the community; and 2. Some assertion of the rights incident to such marriage relation. Until there has been some avowal of the relation between them, the community does not exist at all, so far as the public is concerned, and whenever either member of the community ceases to assert his or her rights under the marriage relation for such a time, and under such circumstances, as to induce the public generally to believe that the other spouse is in fact a single person, then, as between the spouse so neglecting the assertion of his or her rights, and the public, the community does not exist.

Dunbar, J., concurred for the first reason assigned by Judge Scott.

HUSBAND AND WIFE — ESTOPPEL OF ONE SPOUSE TO CLAIM SHARE OF COMMUNITY PROPERTY. — When a husband and wife lived separate at some distance from each other for seventeen years without having any more regard for each other than if they were not married, at the death of one, the other will be estopped to claim his marital share of the property of the deceased: *Pickens v. Gillam*, 43 La. Ann. 350. In *Wright v. Hays*, 10 Tex. 130, 60 Am. Dec. 200, it was held that where the wife is abandoned by her husband for five years, leaving her the entire care and support of herself and family, she could dispose of the community property without his joining in the deed. A wife who deserts her husband and lives in adultery with another up to the time of the husband's death, loses her claim to a community interest in the headright subsequently issued to the heirs of her husband: *Wheat v. Owens*, 15 Tex. 241; 65 Am. Dec. 164, and note. See note to *Cooke v. Bremond*, 86 Am. Dec. 637. A wife may claim acquets and gains made in this state, although she was married abroad and never came in it: *Cole v. Executors*, 7 Martin, N. S., 41; 18 Am. Dec. 241. So in *Farwell Brick etc. Co. v. McKenna*, 86 Mich. 283, it was held that where a wife abandons her husband and home without legal excuse, she loses her marital rights in the homestead.

ANDERSON v. LAND.

[6 WASHINGTON, 498.]

ATTACHMENT, EFFECT OF DISSOLVING — PRIORITIES. — The lien of an attachment is ended, when the attachment is dissolved and after such dissolution, the owner of the property attached can dispose of it as he sees fit, whether it has been actually turned over to him by the officer or not. Hence the rights of one to whom property has been transferred by a *bona fide* bill of sale, after an attachment thereon has been dissolved, are superior to those acquired by a second writ of attachment, which is handed to the sheriff and indorsed by him with the ordinary levy on the same day as the bill of sale is given, but under which no actual levy is made until some days afterwards.

Garrett and Corliss, for the appellants.

W. S. Relfe, for the respondent.

DUNBAR, J. This is an action brought under the provisions of title 4, chapter 4 of the Code of Procedure, the plaintiff and respondent claiming the ownership and right to the possession of certain saw logs attached by the sheriff of Island County, under a writ issued in the case of *L. T. Land v. Judy and Swanson*. The levy of the writ against Judy and Swanson was made on November 14, 1890. The partnership existing between Judy and Swanson had been dissolved prior to that time, Swanson assuming the liabilities and taking the assets. After the dissolution of the partnership, and writ of attachment issued, Swanson executed and delivered to the respond-

ent Anderson his note for three thousand dollars, and a chattel mortgage on the logs in question to secure the same. On the sixteenth day of December the attachment was dissolved, and on the 18th Swanson gave Anderson a bill of sale of the logs, and Anderson took possession of the same at the time. On the eighteenth day of December a second writ of attachment was sued out and delivered to the sheriff, who, without making any actual levy or seizure, indorsed on the writ the ordinary levy. He did not make any actual levy until some days after. Upon the trial of the case the court instructed the jury to return a verdict for the plaintiff.

There can be but two questions in this case: 1. Was there any fraud in obtaining the bill of sale by Anderson? 2. Was there any lien on the logs by virtue of an attachment at the time the bill of sale was given? One is a question of fact, the other a question of law, the facts being conceded.

We have carefully examined the testimony, and agree with the trial court that there was no evidence tending to show fraud in obtaining the bill of sale or tending to dispute the *bona fides* of the transaction, and consequently nothing under that head to submit to the jury.

We are also of the opinion that the court took the correct view of the legal proposition. Even conceding that the lien under the second attachment had not been lost when the sheriff went out of office, which would be a doubtful concession, considering the testimony of the new sheriff that he did not make an actual levy until the fourth day of February, the dissolution of the attachment on the sixteenth day of December ended the lien, and the owner of the property had a right to make any disposition of it he saw fit, no matter whether the property had actually been turned over to him by the officer or not. He could sell the property during the time the writ was in effect in such case, and the purchaser's title would only be subject to the right of the attaching creditor under the writ, and when the attachment was dissolved there would be an end to any such right, and the purchaser's title would be complete.

So far as the right of the officer is concerned his title is dependent for its continuance upon the continuing of the necessity of holding the property to answer the purpose of the writ: Freeman on Executions, sec. 268; Wade on Attachment, sec. 294. Upon the dissolution of the writ the necessity ceases, and all his title to hold the property ceases. If, upon

the dissolution of the attachment, the sheriff had refused to deliver the property to the defendant, the defendant could have maintained an action against him for its possession; and, on the other hand, if, after the dissolution of the attachment, the defendant had taken possession of the property without its having been formally turned over to him, the sheriff would have had no power to enforce its redelivery to him.

It follows conclusively that his right of possession ceased with the dissolution of the writ, and if he was afterward clothed with authority to seize property of the defendant, he must act on that authority, independently of any effect or power of the old writ. It is conceded that he did not make an actual levy in this case until after the sale to the respondent.

We have examined the other points raised by appellant, and we think there is no substantial error in the trial by the court, and judgment is therefore affirmed.

ANDERS, C. J., and HOYT, SCOTT, and STILES, JJ., concur.

ATTACHMENT — CONSEQUENCES OF DISSOLUTION. — Upon the dissolution of an attachment the money realized from the sale of the attached property in the hands of the sheriff is not to be regarded in the custody of the law in such a sense as to preclude the sheriff from applying it upon an execution against the property of the same defendant issued to and received by the same officer after the receipt of such money: *Evans v. Virgin*, 72 Wis. 423; 7 Am. St. Rep. 870. An agent in possession of goods when attached is presumed to continue in possession after the dissolution of the attachment: *Van Brunt v. Pike*, 4 Gill. 270; 45 Am. Dec. 126. Upon the dissolution of an attachment the defendant is entitled to a return of the property without reimbursing the sheriff for any expenses in connection with it: *McReady v. Rogers*, 1 Neb. 124; 93 Am. Dec. 333. Upon the dissolution of an attachment the proceeds of the sale of the attached property in the hands of the clerk should be returned to the defendant: *Petty v. Lang*, 81 Tex. 238.

MESTERMAN v. HOME MUTUAL INS. CO.

[5 WASHINGTON, 524.]

INSURANCE — VIOLATION OF CONDITIONS IN POLICY, EFFECT OF INSURER'S KNOWLEDGE OF. — An insurance company is estopped from asserting the invalidity of its policy at the time it was issued for the violation of any of the conditions of such policy, if, at the time it was so issued, the fact of such violation was known to the company or to its duly authorized agent.

INSURANCE COMPANY, WHEN DEEMED TO BE AGENT OF ANOTHER COMPANY — KNOWLEDGE OF AGENT IMPUTED TO INSURER. — An insurance broker who is employed to place insurance is the agent of his employer and not of the insurer; but where a person applies to an insurance com-

pany for a gross amount of insurance, without giving instructions to place any portion of such insurance with other companies, and receives thereafter from such company policies for the entire amount of the insurance, signed by several other companies and indorsed with a statement that the company applied to is the agent of the companies issuing the policies, the company applied to must, for the purpose of defining the relative rights of the applicant and the insurers, be regarded as the agent of the latter and not of the former. In such a case, if the company dealing with the applicant fails to disclose to one of the insurers a fact material to the risk, which has been truthfully stated in the original application, the knowledge of that fact will be imputed to the insurer, and the latter cannot avoid his policy on the ground that the insured has violated its conditions.

Stott, Boise and Stott, for the appellant.

Thomas C. Griffitts, for the respondent.

HOYT, J. Although there are some cases holding the contrary, we think the decided weight of authority, as well as the better reasoning, is in favor of the rule that an insurance company is estopped from asserting the invalidity of its policy at the time it was issued for the violation of any of the conditions of such policy, or the application therefor, if, at the time that it was so issued, the fact of such violation was known to the company or its duly authorized agent. That the Northwest Fire and Marine Insurance Company had knowledge, at the time of the issuance of the policy by the appellant, of the existence of the additional insurance which it is alleged rendered it void, is made entirely clear by the proofs, and is in fact conceded; hence, under the rule above stated, a policy issued by it could not be avoided on account of such additional insurance.

It only remains to determine as to whether or not the appellant is chargeable with knowledge of the facts thus known to said company. There is some proof tending to show that the fact of such additional insurance was communicated to the appellant; but such fact was not established by undisputed proofs. It follows that if there was no other ground upon which the appellant could be held liable, the action of the court in taking the case from the jury would have been erroneous, as it is not competent for a court to instruct a jury to find a verdict unless the facts warranting such instruction are established by undisputed proofs. It will therefore be necessary for us to investigate the relation which the said Northwest Fire and Marine Insurance Company bore to the appellant and to the respondent. If in what it did it was

acting solely as agent of the respondent, then the appellant would not be bound by the knowledge which it had any further than the same was communicated to it. If, on the contrary, it was acting as the agent of the appellant, the knowledge which it had was in law the knowledge of the appellant, whether communicated to it or not. That an insurance broker, who is employed by anyone to place insurance, is the agent of the person thus employing him, and not of the company with which the insurance may be placed, is well settled by the authorities; but, in our opinion, the facts in this case show that said company was not acting as an insurance broker employed by the respondent. He had made his application to such company for the entire amount of insurance which he desired, and had truthfully stated all the facts required by the company to enable it to act upon the said application. There is nothing whatever in the record to show that he had in any manner instructed said company to place any of the amount for which he had applied with other companies. No knowledge is brought home to him of any change in the application made by him to said company for the entire amount of the insurance. Under this state of facts, when he received the policies for the full amount of insurance by the hands of said company, we think he was justified in assuming that all of them had been issued in pursuance of his said application, even although some of them were issued by other companies, especially as the policies of such other companies had printed upon them, when delivered to him, a statement that the company to which he had made his application was the agent of the company which issued the policy.

The contention of the appellant that the indorsement that the company which delivered the policy was its agent was unauthorized cannot be sustained as against the respondent. The Northwest Fire and Marine Insurance Company was its agent, at least for the purpose of the delivery of the policy, and the assured had the right to assume that as it was delivered to him, it came from the hands of the appellant. Under all the circumstances of the case, it must be held that said Northwest Fire and Marine Insurance Company was the agent of the appellant, and not of the assured, in the matter of the issuance and delivery of the policy in question. It follows that the knowledge of said company was the knowledge of the appellant. All the facts upon which this conclusion is founded were established by undisputed proofs; hence

the instruction to the jury to return a verdict for the plaintiff was proper, and the judgment rendered thereon must be affirmed.

DUNBAR, C. J., and SCOTT, ANDERS, and STILES, JJ., concur.

INSURANCE COMPANY — WHEN ESTOPPED. — An insurance company which knowingly takes a premium for a policy under conditions which render it invalid, is estopped from urging those conditions to release it from its contract: *Germania etc. Ins. Co. v. Hick*, 125 Ill. 351; 8 Am. St. Rep. 384, and note. An insurer, by paying a loss with full knowledge of all the facts, estops himself to deny that it falls within the policy: *Deming v. Merchants' Cotton Press etc. Co.*, 90 Tenn. 306; but a condition in a fire insurance policy against the premises being vacant or unoccupied is not waived by the insurer because of its issuance at a time when the entire premises were vacant: *Connecticut etc. Ins. Co. v. Tilley*, 88 Va. 1024; 29 Am. St. Rep. 770; *England v. Westchester etc. Ins. Co.*, 81 Wis. 583; 29 Am. St. Rep. 917.

INSURANCE COMPANY — HOW AFFECTED BY AGENTS' KNOWLEDGE. — The knowledge of an agent procuring a policy of insurance is the knowledge of the company, and binding on it, and it cannot repudiate the contract after a loss occurs: *Haire v. Ohio etc. Ins. Co.*, 93 Mich. 481; 32 Am. St. Rep. 516, and note; *Beebe v. Ohio etc. Ins. Co.*, 93 Mich. 514; 32 Am. St. Rep. 519, and note; *Follette v. Mutual Acc. Ass'n*, 110 N. C. 377; 28 Am. St. Rep. 693. An insurance company is bound by verbal statements made to its agent and upon which it issues a policy and receives the premium: *Hoose v. Prescott Ins. Co.*, 84 Mich. 309. Whether the knowledge of an agent in procuring a policy of insurance is imputed to his company is discussed in the note to *Beal v. Park Ins. Co.*, 82 Am. Dec. 722. See also *Stevens v. Queen Ins. Co.*, 81 Wis. 335; 29 Am. St. Rep. 905.

KING COUNTY v. FERRY.

[5 WASHINGTON, 536.]

OFFICIAL BONDS — RELATIONSHIP BETWEEN SURETY AND PRINCIPAL. — The sureties on an official bond, by the act of giving their principal the possession and control of the bond, after they have affixed their signatures thereto, constitute him their agent for the purpose of delivering it to the proper authorities, and if some one has to suffer because he has exceeded his powers, as by delivering the bond without procuring the signature of a person who, it was understood, was to be one of the obligors, the loss must fall on the sureties who have thus declared by their acts that he could be relied on to carry out their intentions, unless it is shown that the obligee has notice, either actual or constructive, that the conditions under which he obtained possession of the bond have not been complied with.

OFFICIAL BONDS, EFFECT OF ALTERATIONS IN. — The erasure of the name of a surety on an official bond, and the substitution of another, before its delivery, and without the knowledge or consent of the other sureties, will not avoid it, if it is otherwise regular on its face, and the alteration has been so carefully made that it cannot be detected with

out a close examination. The liability of the obligors, under such circumstances, is legally that of the obligors on a bond which has been altered without notice to the obligee.

OFFICIAL BONDS — LIABILITY OF SURETIES, WHEN CEASES. — The liability of the sureties on an official bond which is to remain in effect "while the officer acts as such," and, "until his successor is elected and qualified," ceases with the expiration of his regular term of office, as defined by the law in force at the time of his election, and does not extend to a supplementary term during which he discharges the duties of his office by virtue of a subsequent statute.

Hughes, Hastings and Stedman, for the appellants.

Ronald and Piles, for the respondent.

DUNBAR, C. J. The complaint alleges that George D. Hill, at a general election held in November, 1884, was duly elected county treasurer of King County for the term of two years from and after the first Monday of January next ensuing, and that on the twelfth day of November, 1884, said George D. Hill, as principal, with John Leary, Joseph F. Monagh, George W. Harris, Elisha P. Ferry, Sutcliffe Baxter, and Guy C. Phinney, as sureties, executed his bond to the county of King in the sum of sixty thousand dollars, conditioned that he would pay over all moneys received by him, and for the further discharge of his duties as such treasurer; that in January, 1885, Hill took the oath of office, and entered upon the performance of his duties as such treasurer, and continued to act as such for the full term to which he was elected, and until the seventh day of March, A. D. 1887; that while he was so acting as county treasurer he neglected and refused to account for and pay over to his successor the sum of twenty-nine thousand seven hundred fifty dollars and eighty-six cents, and that he converted the same to his own use.

To the allegation of the execution of the bond, the sureties, with the exception of Phinney, pleaded *non est factum*. They also denied failure on the part of Hill to duly account for all sums of money which came into his hands, and to pay over to his successor all sums which he ought properly to pay.

There is quite a history attached to the case, which it is not necessary for the purposes of this opinion to repeat here. During the pendency of the action Hill died, and certain executors were substituted, and upon the final trial of the case below a judgment was rendered against the executors and against the sureties on the bond above mentioned for the

sum of twenty-nine thousand one hundred forty-three dollars and sixty cents, with interest from March 7, 1887, which was the date of the expiration of Hill's term of office, as continued by act of the legislature of 1886. Before answering, demurrers had been interposed to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action. The demurrers were overruled.

We will first dispose of the merits of the case by saying that from as thorough an examination of the testimony as it has been possible for us to make, we do not feel justified in disturbing the conclusions reached by the lower court on questions of fact. Upon the trial of the case it was claimed by the sureties that when they signed the bond the name of Henry L. Yesler was in the body of the bond, and that they signed with the understanding that Yesler was to be one of the bondsmen. It appears that after the signing by the parties, but before the delivery to the custodian of the county, the name of Yesler was erased, and the name of Guy C. Phinney substituted. On this state of facts appearing, it is contended by the appellants that the sureties are not responsible, and that the bond as to them is void.

The finding of the court is that the name that was erased from the body of the bond was carefully and neatly erased, and the name of Phinney placed thereon over the name erased; and that when said bond was delivered, approved, and accepted by the commissioners, the bond was in all respects regular upon its face, and that without a close inspection the erasure could not be detected; that the commissioners had no notice sufficient to have put them, as reasonably prudent men, upon inquiry, either from the face of the bond or from any other source whatever.

An inspection of the bond, which is an exhibit in the case, fully justifies the finding. The name of Guy C. Phinney is written smoothly and in regular order after the word "and." It occupies the full space after the name of the preceding surety. It is in the same handwriting with the rest of the bond, evidently written with the same ink, and apparently at the same time and with the same pen. Without one were specially looking for an erasure, it would not be noticed, and even when attention is called to it, it is difficult to say that any other name ever occupied the space now occupied by the name of Guy C. Phinney. So that it must be considered as

a change before delivery without notice to the obligee, and as such we will discuss it.

On the question of the responsibility of the sureties in a case of this kind there is some conflict of authority, and the case of *Walla Walla County v. Ping*, 1 Wash. (Ter.), 343, is cited, and largely relied upon to sustain appellants' views. It does not definitely appear from the opinion in that case whether the blank had been filled before or after the delivery of the bond, but it can be pretty clearly ascertained, from a review of the authorities by the court and its criticisms and arguments, that it sustained appellants' contention; but we are unable to agree with the reasoning of the court in that case. It is conceded in that case that if the alteration had been succeeded by the delivery by the sureties, that the law is well settled that the instrument signed must be considered their bond. But the contention is that it is not enough to constitute a delivery that the bond has been signed and sealed, and put out of the possession of the signer, and that where such bond has been changed contrary to the understanding at the time it was signed, the delivery to an agent or a co-obligor ought not to be construed the true technical delivery. But it seems to us that the pertinent question is, is the party who makes the final delivery to the obligee the agent of the surety, or is he the agent of the obligee? If he is the agent of the surety, then the surety, under the familiar principle that the act of the agent is the act of the principal, is bound; for the alteration has been succeeded by the delivery by the sureties, and the law in that case, as is said by the court in *Walla Walla County v. Ping*, 1 Wash. (Ter.), 343, is so unquestionably settled that the instrument sued must be considered their bond, that it is idle to cite authorities.

Why should not a principal in a bond be held to be the agent of the sureties, instead of the county, in this case? He can in no sense be held to be the agent of the county in furnishing his own bond. It would be against the policy of the law, and would defeat the very object which the law has in view in providing for the bond. He is clothed with no authority by the county, but, on the other hand, other officers are especially authorized to pass upon the sufficiency of his bond in every particular, and are made the agents of the county for that purpose. His interest, as far as the bond is concerned, might be said to be antagonistic to the interest of the county. There is no confidence between the treasurer

and the county in this respect; but the sureties, on the other hand, by their very act of delivering to the principal their executed bond, to be filed with the proper authorities, establish a relation of confidence and trust,—the relation of agency. They have certainly made him an agent for the purpose of delivering the bond that they executed. They have held him out as an agent to the county, and if he has exceeded his authority, and some one has to suffer, it should be the ones who intrusted him with their business, and who said by their acts that he could be relied upon to carry out their intentions, and not the county, which is not in any way responsible for him. The law provides no way by which the county can summon the sureties to appear and make an examination of the bond for the purpose of ascertaining whether all the private understandings between the principal and the sureties have been carried out; and yet, without some such investigation is made, under the appellants' theory, there would be so many pretexts for avoiding bonds that the taking of such obligations would be little less than a farce.

On the other hand, the sureties have it in their power, by the observance of the ordinary rules of prudence, to see that their agreement with the principal is expressed in the bond that is filed. Of course, if there is anything on the face of the bond when it is delivered to excite the suspicion of the obligee that the bond has been tampered with, or sufficient to put a prudent person on his guard, he ought to be held bound to make an investigation before accepting the bond. But to hold the obligee responsible where the bond is good on its face, and where he has no notice until after the defalcation has occurred, is, in our judgment, not only wrong in principle, but is also opposed to the great weight of authority; and a brief review of the authorities cited by the appellants will show that on principle they nearly all sustain this view.

Section 44 of Murfree on Official Bonds, is as follows: "If a surety executes a bond and delivers it to the principal obligor upon conditions agreed upon between them, and with instructions to fill blanks or procure other sureties, he makes the principal obligor his agent, and is bound by his acts done within the scope of his apparent authority. Unless the obligee has notice of the conditions and instructions, he cannot be bound by them. The surety confides in the principal, the obligee does not."

Section 58 of the same book is but a repetition of the doctrine announced in section 43, viz.: That where the obligee has notice of the condition it cannot recover on the bond, and that it is the duty of officers intrusted with the authority to take and approve official bonds, to use ordinary care and prudence to protect the security, as well as to see, in the interests of the public, that the bond is valid, and the security sufficient. Section 756 states the English rule as being that the alteration is fatal to the validity of the instrument, "if made after execution, and while . . . in the possession or under the control of the party seeking to enforce it," which does not affect the case under consideration. Section 760 cites cases sustaining the rule that the validity of the bond would be abrogated, if after its execution one of the signatures is erased; but an investigation of the cases cited by the authority, which are also the cases cited by appellants, reveals the discriminating fact that there was sufficient notice given to charge the obligee with the duty of investigation. Thus, in *Smith v. United States*, 2 Wall. 219, the court, while holding the surety harmless, also in the argument distinguished it from cases where no notice of the alteration had been given to the obligee. It says, in stating the case: "Materiality of the alteration is not denied, and the plaintiffs admit that it is apparent on the face of the instrument."

The instrument showed on its face that it had been signed by one Hoyne as surety, but that his name had been erased after the execution by the other surety. The instrument showed this on its face, and the judge who had approved the bond testified that it had presented the same appearance when it was presented to him for approval. The court also says it is claimed by the plaintiffs that "it left the liability of all concerned precisely as it would have stood if the person whose name was erased had only promised to sign, and had not fulfilled his engagement," which is the case at bar, and which condition of things the court in that case, at least inferentially, holds would not release the sureties. In *State v. Craig*, 58 Iowa, 238, the surety whose name was afterwards erased had actually signed the bond, and the signature itself was erased by the drawing of two lines through it with purple ink; differing from this case in the two essentials of being actually signed, and in the notice given to the obligee. *McCramer v. Thompson*, 21 Iowa, 244, was a case where a promissory note had been changed. The signing had been actually done, and

the payee had notice. The distinguishing feature of notice was commented upon by the court, for it said: "When presented to the payee, one of the names was obliterated or erased. This could be seen, was seen and talked about. . . . The note then being in this condition, he was put upon inquiry. Thus situated, did he manifest the diligence required by law?"

Thus it will be seen that the decision was based squarely on the ground of want of proper inquiry after notice. *Hessell v. Johnson*, 63 Mich. 623, 6 Am. St. Rep. 334, was decided on the express ground that sufficient notice had been given to the obligees to put them on inquiry. In *Sharp v. United States*, 4 Watts, 21, 28 Am. Dec. 676, the act of Congress authorized a bond with two or more sureties. This act was recited in the bond, and the court held that the sureties had a right to believe that it was the intention of all the parties that the bond was to be taken in strict conformity with the act, and that the other surety whose name was on the bond when he signed would also execute the bond. In this case, also, the government had notice that the bond had not been executed by all the sureties mentioned in the bond.

Allen v. Marney, 65 Ind. 399, 32 Am. Rep. 73, cited by appellants, as we read the case, squarely sustains the rule laid down by us above. There the court decides that where the surety on the appeal bond intrusted the bond to the principal, the principal becomes the agent of the surety, and the officer approving the bond becomes the agent of the other party. The sureties were discharged, but upon the ground that sufficient notice had been given by the appearance of the instrument itself to put the obligee upon inquiry. The court quotes approvingly a comment by Judge Redfield, in note to *York County etc. Ins. Co. v. Brooks*, reported in 3 Am. Law Reg., N. S., 402, where that author, in a review of this subject, among other things, says: "That one who signs a bond, as surety, upon the assurance of his principal that he shall also have other responsible cosureties, which are never procured and the bond, nevertheless, delivered, is deceived and defrauded of his indemnity, no one can question. But whether he shall himself bear the loss, or visit it upon the obligee, is quite a different question. And it seems to us, upon principle, that where there is nothing upon the face of the paper indicating that other cosureties were expected to become parties to the instrument, and no fact brought to the knowledge

of the obligee, before he accepts the instrument, calculated to put him on his guard in regard to that point, and which would naturally have led a prudent man, interested in the opposite direction, to have made inquiry before accepting the security, the fault cannot be said to rest to any extent upon the obligee."

In *Ward v. Churn*, 18 Gratt. 801, 98 Am. Dec. 749, the same distinction as to notice was maintained, the court saying: "It is not necessary to consider this question in respect to instruments which are apparently on their face complete and perfect, according to the intention of the parties. It is only necessary to consider it in reference to instruments such as that in the present case, which indicate on their face that they are not complete, and that it was intended that other signatures should be affixed."

Fletcher v. Austin, 11 Vt. 447, 34 Am. Dec. 698, was a case where the names of the obligees [obligors?] appeared in the body of the bond, who did not execute the same, and the court held that sufficient to put the obligee on inquiry to ascertain if those who did sign had consented to its being delivered without the signatures of the others. In *Hagler v. State*, 31 Neb. 144, 28 Am. St. Rep. 514, the surety, Moffitt, had signed the bond before the defendant signed and executed it. Moffitt's name was afterwards erased by drawing a pencil line through it. The court said that the alteration of the bond was such as to attract the attention of the reader, and that it was the duty of the officer who approved it to decline to accept it in its altered condition. The court in concluding, says: "The principle established by the adjudicated cases is, that where an official bond is altered after the same has been signed, but before its delivery and approval, by the erasure of the name of one of the sureties thereon, and the alteration is plainly noticeable, all the sureties are released who had no knowledge of or did not consent to the alteration, nor ratify it," citing the cases we have reviewed above.

In *Pawling v. United States*, 4 Cranch, 219, the obligee had notice of the fact that the additional securities who did not sign were named in the body of the bond. *Linn County v. Farris*, 52 Mo. 75, 14 Am. Rep. 389, is a very meager case, and it does not appear from the opinion whether or not the bond was regular on its face, and the question of notice is not discussed. But that case is criticised in *State v. Potter*, 63 Mo. 212, 21 Am. Rep. 440, a well-considered case, where it

is held that the agreement of a surety with his principal that the latter shall not deliver a bond till the signature of another be secured as a cosurety, will not relieve the surety of his liability on the bond, although the cosurety is not obtained, where the obligee takes the bond without notice; and such is now the well-established rule in Missouri.

Linn County v. Farris, 52 Mo. 75, 14 Am. Rep. 389, is the only case cited by appellants where it does not appear that the obligee had sufficient notice to warn him that the agent of the sureties had exceeded his authority by changing the conditions agreed upon between him and the sureties, sufficient to put him upon inquiry. And this, we think, is the only logical ground upon which the sureties can be exonerated at all. The obligee in such a case, having notice of the fraud perpetrated upon the sureties, should be estopped from recovering the benefit of it. But if no such notice is given to the obligee, then the sureties should be estopped from transferring the burdens resulting from loose methods of business and their misplaced confidence in unworthy agents to the shoulders of others who are in no way to be blamed, and who have been in no way instrumental in bringing about the loss.

We have especially reviewed all the cases cited by appellants, on the theory that they have presented the most favorable cases that can be found tending to sustain their contention. Some of the old English authorities sustain the doctrine contended for by appellants on the ground, which cannot be disputed as an abstract proposition of law, that a deed or instrument under seal, to be binding, must be in writing, signed, sealed, and delivered by the parties, and that if any change has been made in the instrument it is not the instrument which the parties made, and that if it is given to another party after execution, to be delivered upon certain conditions being performed, it is simply in *escrow*. But as we have above said, this ignores the doctrine of agency in cases of this kind, and does not really conflict with the principle that these confidential conditions, to be made effective, must be brought to the notice of the party who is to be affected by them; and the great weight of modern authority sustains the rule laid down by the supreme court of the United States in *Dair v. United States*, 16 Wall. 1, that a bond, perfect upon its face, apparently duly executed by all whose names appear thereto, purporting to be signed and delivered without a stipu-

lation, cannot be avoided by the sureties upon the ground that they signed it on a condition that it should not be delivered unless it was executed by other persons, who did not execute it, where it appears that the obligee had no notice of such condition, and there was nothing to put him upon inquiry as to the manner of its execution, and that he had been induced upon the faith of such bond to act to his own prejudice. Many cases have gone beyond this in holding sureties responsible, but few if any of the modern cases have relaxed the rule for the purpose of exonerating them. The rule laid down in *Dair v. United States*, 16 Wall. 1, was affirmed by the supreme court of the United States in *Potter v. United States*, 107 U. S. 126, the court there holding that the surety relied upon the good faith of the principal; that he clothed him with apparent power, and that he is in equity estopped from claiming as against the government the benefit of his private instructions to his agent.

The case of *State v. Peck*, 53 Me. 284, may be said to be the leading American case on this interesting question, and a case the reasoning of which has since been closely followed and adopted by the supreme court of the United States. The authorities are reviewed with discrimination and the result announced is in harmony with the quotation from Chancellor Kent that, "whoever deals with an agent constituted for a special purpose, deals at his peril, when the agent passes the precise limits of his power, though, if he pursues the power as exhibited to the public, his principal is bound, even if private instructions had still further limited the special power." In fact, this is now the almost universal American holding, the later cases, in many instances, directly abrogating the early decisions. Thus the doctrine announced in *People v. Organ*, 27 Ill. 29, 79 Am. Dec. 391, which is a case generally cited to support the theory contended for by appellants, was substantially overruled, or at least the principles upon which it was based were overruled, in *Smith v. Supervisors*, 59 Ill. 412; *Bartlett v. Board of Education*, 59 Ill. 364; *Comstock v. Gage*, 91 Ill. 328; and in *Chicago v. Gage*, 95 Ill. 593, 35 Am. Rep. 182, in an opinion reviewing all the authorities, the case of the *People v. Organ*, 27 Ill. 29, 79 Am. Dec. 391, was specially mentioned, and the doctrine on which it was based was condemned and the rule announced as enunciated in *State v. Peck*, 53 Me. 284.

All these later cases are based upon the doctrine of *Texira*

v. *Evans*, referred to in 1 Anstr. 228, a case which to-day is pretty generally conceded to sustain principles in harmony with public policy, and the application of which compels the burden of loss to fall upon the party who by his actions and by the apparent authority with which he clothed his agent, has made the loss possible. The following, among other cases which we have examined, sustain this contention: *Brandt on Suretyship and Guaranty*, sec. 603; *Inhabitants etc. v. Huntress*, 53 Me. 89; 87 Am. Dec. 535; *Cooper v. De Mainville*, (Col. App. June 23, 1891) 27 Pac. Rep. 86; *White v. Duggan*, 140 Mass. 18; 54 Am. Rep. 437; *Mathis v. Morgan*, 72 Ga. 517; 53 Am. Rep. 847; *Tidball v. Halley*, 48 Cal. 610; *Jordan v. Jordan*, 10 Lea, 124; 43 Am. Rep. 294; *Taylor County v. King*, 73 Iowa, 153; 5 Am. St. Rep. 666; *Hall v. Smith*, 14 Bush, 604; *Ordinary v. Thatcher*, 41 N. J. L. 403; 32 Am. Rep. 225; *Cutler v. Roberts*, 7 Neb. 4; 29 Am. Rep. 371; *State v. Pepper*, 31 Ind. 76; *Butler v. United States*, 21 Wall. 272; *Nash v. Fugate*, 24 Gratt. 202; 18 Am. Rep. 640; *Trustees v. Sheik*, 119 Ill. 579; 59 Am. Rep. 830; *Harvey v. State*, 94 Ind. 161; *Lucas v. Owens*, 113 Ind. 521; *Carroll County v. Ruggles*, 69 Iowa, 269; 58 Am. Rep. 223; *Belloni v. Freeborn*, 63 N. Y. 383; *Fullerton v. Sturges*, 4 Ohio St. 535; *Western etc. Ins. Co. v. Clinton*, 66 N. Y. 326; *Mechem on Public Officers*, sec. 279, and authorities there cited.

In fact, the rule not only rests securely upon the law of agency, which makes the principal responsible for the acts of his agent, regardless of private understandings, when he has held the agent out to the world as possessing general powers over the matter in hand, but it also rests on the equitable doctrine that where two innocent parties suffer, the injury must be sustained by the one who put it in the power of another to do the injury. And for these reasons it ought to be, and is almost universally, sustained.

But there is another proposition raised in this case that is vastly more troublesome. Under the law existing at the time Hill was elected and at the time the bond was executed, the treasurer's term of office expired on the first Monday in January, 1887, but on February 4, 1886, by legislative enactment, his term of office, in common with the other county officers in the county, was extended to the first Monday in March, 1887.

It appears from the testimony, and is so found by the court, that twenty-two thousand sixty-four dollars and thirty-

four cents of the amount of delinquency came into his hands after the first Monday of January, 1887, and the contention of appellants is that the sureties in any event are not responsible for that amount; that the sureties of an officer, who is chosen periodically and to hold an office until his successor is chosen and qualified, are bound for the period only for which the officer was chosen.

The importance of this case, not only as it affects the rights of the sureties, but as affecting the public in the administration of the different departments of the government, and the necessity of guarding the public funds as far as is consistent with private rights, have led us to an extended investigation of the authorities bearing on the subject, and we have examined them both with reference to number and cogency of reasoning. The authorities cannot be reconciled, some courts holding that the bond is made in contemplation of the law, and must be construed with reference to the law governing the office, and where the law provides that the term of office shall continue until the successor is elected and qualified, which is the law governing this case, that the bond is given not only for the statutory term, but for the further time which may elapse between the end of the expressed statutory term and the time when the successor is elected and qualified; that the law becomes incorporated into the bond; that the sureties are bound to know that his right to the office may extend beyond the year, and that this possible extension is taken into consideration and provided for in the bond. Such is the doctrine of *State v. Berg*, 50 Ind. 502; *Commonwealth v. Drewry*, 15 Gratt. 1; *Pickering v. Day*, 3 Houst. 474; 95 Am. Dec. 291; *State v. Kurtzeborn*, 78 Mo. 98; *Thompson v. State*, 37 Miss. 518; *McAffee v. Russell*, 29 Miss. 84; *Hughes v. Smith*, 5 Johns. 168; *People v. Beach*, 77 Ill. 52; *Kindle v. State*, 7 Blackf. 589; *Exeter Bank v. Rogers*, 7 N. H. 21; *State v. Daniels*, 6 Jones, 444.

Some of these are cases arising on official bonds, and some of them on bonds of corporation officers, and there have been attempts by some courts holding the opposite doctrine to discriminate them. But while there may be discriminating circumstances in some of them, they are all decided on the same general principles enunciated above, and generally rely on the same early cases to sustain them, and must therefore be conceded to logically sustain respondent's position.

But after a great deal of deliberation, and, we must admit,

some hesitation, we are constrained to adopt the opposite view, which is amply sustained by authority and we think by better reasoning. No consideration of the interests of the public will justify a court in extending by construction the obligation of a citizen under his contract beyond the scope of its natural import. The contract which embodies this obligation, like any other contract, must be construed to give effect to the intention of the parties, and that intention is to be gathered from the language employed and the circumstances surrounding the execution of the instrument. Now, what were the circumstances surrounding the execution of this bond, and what length of time would these bondsmen naturally think they were contracting with reference to? The correct answer to the last question determines their liability. There need be no artificial rules of law applied. It is a simple question of intention gathered from the language of the contract, read in the light of the surrounding circumstances.

At the time this bond was given the term of office of the treasurer as provided by law was two years. It is argued that the bondsmen entered into their obligation in view of the possible modification of their liability by the legislative assembly, and with notice that the legislature would have a right to continue the incumbent in office beyond the term for which he was elected. So far as the first proposition is concerned, the legislature would not have any right to pass a law that would change the terms of the contract or in any way impair its obligation; and so far as the second proposition is concerned, while the sureties might be held to take notice that the legislature could extend the term, they would not be required to take notice that the legislature in such an event would make no provision for the giving of a bond by the treasurer for the extended term. The sureties had a right to take notice of the law as it existed, and to contract with reference to the law as it existed; that is, the law which would naturally be in their minds when they entered into the contract. And the idea that they would at such a time enter into a speculative calculation of what the law might be in the future, and shape their contract with reference to such possible change, is a strained one.

The law at that time made the office one of a definite term; that term was two years; and the sureties had a right to, and no doubt did, take that law into consideration, and that

was the law that was imported into their contract. There is no doubt that the central idea was that the term was for two years. This was the law; this was the ordinary state of affairs and the ordinary time for which bonds for county officers were given. A man might willingly go on a bond for two years who would hesitate or absolutely refuse to go on for a longer period. So far as the term, "until his successor is elected and qualified," is concerned, while it might have great significance when applied to the officers of private corporations, it can have none here, for the law provides when the officer elect shall qualify, and if he does not qualify within the time prescribed the commissioners can declare his office forfeited, and appoint another officer. Many of the courts hold that the bond will remain in force for a reasonable time, a sufficient time in case of accident, surprise, or emergency to permit the authorities to provide for other security; but there is no question of reasonable time in this case.

In this instance, when the term of office for which the bond was given had expired, another bond should have been required, and if the authorities have neglected their duty, or the legislature has inadvertently failed to make provision for a proper bond, it is inequitable and unjust to make the sureties for the original term responsible for such neglect and inadvertence. It is well said in many of the cases that if the sureties can be held responsible for two months longer than the stated term, they can be held for two years, or for any indefinite term, and no such construction can be placed upon this bond without doing violence not only to the language of the bond itself but to the spirit of the law which provides for it. But it is stated that the language of this bond is peculiar, inasmuch as the bond states when the term of office commenced, but does not state when it ends, and further provides that it shall remain in effect "while he shall act as such county treasurer under such election." We do not think there is any substantial difference between this and the ordinary bond.

At the time the bond was given the treasurer's term of office expired on the first Monday in January, and the sureties must be presumed to have contracted with reference to the law at that time, and that they had that time in mind when they used the words, "under such election," and not the time that he was acting under the subsequent act of the legislature. In other words, they are presumed to have con-

tracted with reference to laws passed antecedent to the date of the bond, and it is almost universally held that expressions of this kind in bonds will not be construed beyond the liability imposed by the law, unless it is clearly and explicitly made manifest that the sureties intended that their obligation should reach beyond the term prescribed by the law, where the term is definite.

In *Peppin v. Cooper*, 2 Barn. & Ald. 431, where the office of collector under the act of parliament was an annual office, and the bond, after reciting the appointment of H. W. to be collector under the act, was continued "for the due collection by H. W. of the rates and duties at all times thereafter," it was held that the due collection of the rates for one year was a compliance with the conditions of the bond. So in *Lord Arlington v. Merricke*, 2 Saund. 411, the general terms were construed to be restricted by the recital stating an appointment for a specified time. In the case of the *Liverpool Water Works Co. v. Atkinson*, 6 East, 507, the subsequent stipulation of the bond was, "during the continuance of his employment and so long as he should continue to be employed." These words were held not to extend the responsibility beyond the term. And as sustaining the proposition that when the office is in fact for a specified term, although not so recited in the bond, still the bond only covers the term specified, we cite *Wardens etc. v. Bostock*, 2 Bos. & P. N. R. 175; and *Hassell v. Long*, 2 Maule & S. 363, and such we think is the universal English holding; and while this bond does not recite the ending of the term, it recites the commencement of the term, and is as much a reference to the term that existed as if it had been more minutely described.

One of the earliest cases decided in the United States was *Bigelow v. Bridge*, 8 Mass. 275. The bond in that case was as follows: "The condition of this obligation is such that, whereas the above-bounden Ebenezer Bridge is chosen treasurer of the said county of Middlesex, and hath taken upon him that trust; now, therefore, if the said Ebenezer Bridge shall faithfully discharge the duties of the office of treasurer of said county, and account for all sums of money which he shall receive for the use of the said county, then this obligation shall be void, otherwise to remain in full force."

The provision of the statute of Massachusetts at that time was substantially like ours, viz.: That "the county treasurer shall continue in the said office for the term of one year and

until some other person shall be chosen and qualified," with a provision for an annual election. It will be observed that the bond was absolutely without limit as to time, and if literally construed its obligatory force would have been indefinitely extended; but the court held the bond good only for the year, and in rendering the opinion, after referring to the statute, said: "But the choice of county treasurer being by that statute annual, it is apparent that the bond required by it was intended for the protection of the public so long only as the person chosen should continue in office in virtue of such election."

The securities of an officer appointed for a limited time are only liable for his official acts during the term for which he was appointed: *Moss v. State*, 10 Mo. 338; 47 Am. Dec. 116.

The same doctrine is announced in *State Treasurer v. Mann*, 84 Vt. 371; 80 Am. Dec. 688; *Welch v. Seymour*, 28 Conn. 387; *United States v. Kirkpatrick*, 9 Wheat. 720; *Chelmsford Co. v. Demarest*, 7 Gray, 1; *Wappello County v. Bigham*, 10 Iowa, 39; 74 Am. Dec. 370; *Dover v. Twombly*, 42 N. H. 59; *Kingston Mut. Ins. Co. v. Clark*, 33 Barb. 196; *Patterson v. Inhabitants etc. Freehold*, 38 N. J. L. 255; *Miller v. Stewart*, 9 Wheat. 680, and many other cases too numerous to enumerate and all based upon the doctrine announced in the English cases we have cited, and the case of *Bigelow v. Bridge*, 8 Mass. 275.

There is some contention in this case as to what the rule is in California. In *People v. Aikenhead*, 5 Cal. 106, it was decided that the sureties on the bond of an officer for one term should not be liable for any act done by him after election to a second term: *Brown v. Lattimore*, 17 Cal. 93, was on a dead level with the case at bar. Brown was elected for two years and gave a bond for the performance of his duties for the period for which he was elected, and until the election and qualification of his successor. Under the law in force at the time his bond was given, his term would have expired on the first Monday in October, 1859, but the legislature extended his term to the first Monday in January, 1860. It was held that the sureties were not responsible for the official conduct of the treasurer during the time for which the term was extended; that the legislature had no power to extend their liabilities beyond the prescribed term of the contract. Said the court: "They were to be bound, it is true, until the qualification of a successor, but if the legislature had not interposed the period of liability would have been terminated by such

qualification on the first Monday in October, 1859. So far as they are concerned the effect of the extension was to create a new term to commence at that time and continue until the first Monday in January, 1860. For the conduct of the treasurer during this term they did not undertake to be responsible and cannot therefore be held."

And the decision was based on the principles enunciated in *People v. Aikenhead*, 5 Cal. 106. But it is contended by appellants that *Brown v. Lattimore*, 17 Cal. 93, has been overruled in *Placer County v. Dickerson*, 45 Cal. 12, and *Fresno Enterprise Co. v. Allen*, 67 Cal. 505. *Brown v. Lattimore* was not referred to in *Placer County v. Dickerson*, and we do not think it was the intention of the court to overrule it or to overrule any principles announced in it. The latter case was not a case where a new term was created by the legislature, which was the point decided in *Brown v. Lattimore*, but it was a case where the incumbent refused for one day to turn the office over to his successor. It was by the unlawful act of the principal that he held the additional day, and the court said that the responsibility of the defendants for the official acts of the treasurer, under the circumstances, was the same as though the latter had, by the expiration of his term, continued in the office pending proceedings by *quo warranto* to oust him from it, and, in that case, their liability would be unquestionable. *Fresno Enterprise Co. v. Allen* decided that the obligations of the bond in that case, which was a private corporation, could not be extended, and it based its decision on *Bigelow v. Bridge* and *Hubert v. Mendheim*, 64 Cal. 213. By referring to *Hubert v. Mendheim*, it will be found that the court decided that an official bond is given for and has reference to a particular official term, and the demurrer to the complaint in that case was sustained because it did not state that the breach occurred during such term; and the doctrine announced in *State v. Aikenhead*, 5 Cal. 106, and *Brown v. Lattimore*, 17 Cal. 93, was approved and reaffirmed. The case of *Priet v. De La Montanya*, 85 Cal. 148, does not undertake to change the rule, so that *Brown v. Lattimore*, must be considered the settled law in California.

We think there is nothing in the bond in this case to take it out of the rule announced in the cases we have cited, and, as said by the supreme court of California, quoted above, that as to these sureties the extended term was a new term for which they are in no way responsible.

We have examined the cases cited by respondent which hold that where additional duties are imposed upon the officer, as, for instance, where additional funds are made by law to come into his hands, that the sureties were held responsible for the safe keeping of such funds. But an entirely different principle is involved in such cases, and they can have no bearing on the case at bar. Neither can the position of the respondent be controverted, that the legislature has constitutional authority to change the statutory term of office; but that authority does not carry with it the right to extend the operations of a contract or change its liabilities.

Whether or not the respondent's contention be correct, that the plea of *non est factum* does not put in issue the question of the alteration of the bond, is not now necessary to determine. But we are of the opinion that even under the code practice the answer in this case is sufficient to raise the question of defendant's liability during the extension of the term. Some strong cases are cited by respondent from Indiana, but those decisions are based on a sweeping statute, which provides that, "all defenses, except the mere denial of the fact alleged by the plaintiff, shall be pleaded specially."

The extreme length of this opinion renders impracticable an extended review and analysis of the authorities on this question, but when once we recognize the legal proposition that the obligations of the bond do not reach to the extended term, the court will take notice of the statutory law which is a general one, and would not allow on its own motion a judgment for the defalcation occurring during that time, even if the defendant did not answer at all, any more than it would allow judgment for defalcation during two terms of the officer, when the complaint showed on its face that the action was on a bond given for one term. In other words, the plaintiff could not take judgment for more than its complaint showed it was entitled to under the law.

The respondent argues that even if the court should hold that these matters could be admitted under this plea, that they are bad pleas because they are joint pleas, and are no defense to some of the defendants, and being joint pleas and bad as to some they are bad as to all. That principle has no application to this case, for we hold that none of the defendants can be held responsible in this action for defalcations occurring during the extended term. The principal is no

doubt responsible in a proper action, but this is an action on a joint bond, and the liability of all the parties to the bond, so far as the bond itself is concerned, terminates at the same time.

We have examined other errors alleged by the appellants, but do not sustain them.

Considering the time that has been devoted to this case, both in this court and the court below, and the great amount of costs which a new trial would necessarily involve, we deem it advisable, under the authority conferred on this court by section 1429 of the Code of Procedure, to decree that, if the respondent within thirty days from the filing of this opinion, shall file with the clerk of this court its agreement to remit the sum of twenty-two thousand sixty-four dollars and thirty-four cents from the judgment of twenty-nine thousand one hundred forty-three dollars and sixty cents, obtained by it in the court below, the remainder will be allowed to stand; but upon its failure so to agree, the judgment will be reversed and the cause remanded for a new trial. The appellants will in any event recover their costs of this appeal.

ANDERS, STILES, and SCOTT, JJ., concur.

HOYT, J., not sitting. —

OFFICIAL BONDS — EFFECT OF ALTERATION IN. — When an official bond is altered after signing, but before delivery and approval, by the erasure of the name of one of the sureties, and the alteration is plainly noticeable, all the sureties are released who had no knowledge of, or did not consent to the alteration, nor ratify it: *Hagler v. State*, 31 Neb. 144; 28 Am. St. Rep. 514, and note; *State v. Allen*, 69 Miss. 508; 30 Am. St. Rep. 563, and note.

OFFICIAL BONDS. — LIABILITY OF SURETIES, WHEN CEASES: See extended note to *Crown v. Commonwealth*, 10 Am. St. Rep. 845, 856. Where an officer has an office for a definite term, and gives a bond for his good behavior during that term, and until the appointment of his successor, the bond does not extend until the actual appointment of the successor, but only to a reasonable time for such appointment: *Mayor v. Crowell*, 40 N. J. L. 207; 29 Am. Rep. 224, and note. And so a bond for the good behavior of an officer holding office for a fixed term, and until "another" officer is appointed, is not in force after the reappointment of such original officer: *Citizens' Loan Ass'n v. Nugent*, 40 N. J. L. 215; 29 Am. Rep. 230.

INDEX TO THE NOTES.

ACKNOWLEDGMENT of deeds before notary who is a nominal party thereto, 814.

ADMIRALTY, contract to repair a vessel is a maritime contract, 309.

jurisdiction of state courts to enforce liens against vessels, 810.

maritime contracts, liens upon, created by state statutes, 309.

ANIMALS, impounding statutes, validity of, 862.

ASSIGNMENT of future earnings, 245.

of future wages or salary of public officers, 245.

ASSIGNMENT FOR CREDITORS, preferences in, 856.

preferences valid in state where made will be sustained in other states, 656.

ATTACHMENT, dissolution of, and its consequences, 877.

ATTORNEY AND CLIENT, privileged communications between, what are, 261.

BANKS AND BANKING, deposit of money in name of another, effect of, 220-224.

BROKER acting for both buyer and seller, and receiving commissions from both, 328.

COLLATERAL SECURITIES, acceptance of less than amount due in payment of, 744.

diligence must be exercised in collecting, 744.

COMMON CARRIER, adverse claims being made to property, the carrier may compel an interpleader, 734, 735.

burden of proof when goods have been delivered to third person claiming to be the true owner, 733, 734.

conversion by, of goods by delivery to claimant who does not prove to be the owner, 734.

conversion by, of goods by refusal to deliver them to the true owner, 734.

conversion, not guilty of by receiving property from person in apparent possession, 735.

delivery by, of goods to the true owner when excuses delivery to shipper or consignee, 731.

delivery of goods before notice of adverse claim, 734.

delivery of goods to person claiming to be true owner, burden of proof of ownership, 733.

delivery of goods, when excused by their seizure under legal process, 734.

demand for goods by person claiming to be the owner, right of the carrier to time to investigate, 734.

- COMMON CARRIER**, duty of to deliver goods to true owner though received from another person, 734.
 legal process, connivance of carrier in seizure of goods under, 735.
 legal process, duty of carrier to notify owner of seizure of goods under, 735.
 legal process, if regular on its face, justifies carrier in surrendering possession of goods, 736.
 legal process, seizure of goods under, when exonerates carrier from liability, 735.
 legal process, surrender of goods to officer having no authority to take them does not relieve carrier, 736.
 officer, delivery of goods to must be justified by legal process, 736.
 shipper of goods, when may not complain of their delivery to the true owner, 731, 732.
 title of third person cannot be urged by carrier against shipper, 731, 732.
 true owner of goods may compel delivery of them though carrier received them from another person, 734.
- CONFUSION OF GOODS**, doctrine of, 512.
- CONSIDERATION**, meritorious, defined, 191.
- CONTRACTS**, for sale of goods to be delivered in the future, when illegal; 564.
 to procure legislation, invalidity of, 615.
- CONVEYANCES**, voluntary, when fraudulent and void, 402.
- CORPORATIONS**, agents, authority of, when may be inferred, 822.
 agents of, by what means may be appointed or authorized to act, 822.
 agents of can have no authority to do acts in excess of the corporate powers, 822.
 foreign, conditions which may be exacted of for permission to do business within the state, 160.
 foreign, when subject to the jurisdiction of our courts, 293.
 pledgee's right to vote stock, 644.
- CREDITOR'S BILL**, judgment at law, when not necessary to support, 856.
- DAMAGES**, exemplary for acts of agents, 761.
- DEED**, acknowledgment of before a party thereto, 814.
 conflict between granting and *habendum* clauses of, 164.
 reservation repugnant to the granting clause, 179.
- DEFINITION** of direct and consequential results, 846.
 of domicile, 313.
 of heirs, 751.
 of libel, 639.
 of meritorious consideration, 191.
 of promissory notes, 105.
 of wagers, 703.
- DIVORCE**, admissions or confession of husband or wife as evidence in actions for, 482.
 alimony, alteration of after decree of divorce has been entered, 64.
 confessions of paramour, admissibility of, 482.
 procured in another state, when valid, 254.
 testimony of the parties, to what extent must be corroborated, 482.
- DOMICILE**, definition of, 313.
 how acquired and abandoned, 314.

EASEMENTS, notice of existence of, from what inferred, 708.

of light and air, whether may be implied, 709.

purchase, when taken subject to, 708, 709.

reservation of, in favor of grantor is not implied unless the easement is necessary, 708.

will be implied more readily in favor of grantee than of grantor, 708.

ESTOPPEL of husband to urge, for the purpose of avoiding his conveyance, that he was married, 871.

of wife living outside the state to urge her rights against persons dealing with the husband in ignorance of the marriage, 871.

EVIDENCE, declarations of officers of corporation, when admissible against, 530.

EXEMPTION FROM EXECUTION, agreements to waive, 133.

garnishment proceedings cannot deprive debtor of benefit of, 78.

See **HOMESTEAD**.

FACTORS, sales by contrary to instructions, 766.

FRAUDULENT CONVEYANCES, burden of proof respecting, 402.

burden of proof respecting, when shifts, 402.

circumstances putting purchaser on inquiry, 397.

consideration, payment of will not protect purchaser having guilty knowledge, 398, 399.

consideration for, inadequacy of, 395.

creditor taking in payment of debt, 396.

creditor taking property in payment of debt must not unnecessarily injure other creditors, 397.

creditor's right to accept in payment of his debt, 396, 397.

creditor's right to secure himself, 396, 397.

creditors, priority which one may lawfully gain over the other, 397.

evidence, direct or affirmative proof of fraud is not required, 400, 401.

evidence, what sufficient to show purchaser's guilty participation in, 400.

guilty knowledge of purchaser which will avoid, 398.

innocent purchaser under is protected, 395.

insolvency of grantor does not make his conveyance fraudulent, 396.

joinder of plaintiffs in actions to set aside, 775.

knowledge of facts sufficient to put purchaser on inquiry, 399-402.

known insolvency of grantor does not charge purchaser with notice of fraudulent purpose of, 396.

notice of unlawful purpose, what sufficient to charge purchaser with, 399.

participation by purchaser in purpose of, from what may be inferred, 398.

participation by purchaser in unlawful motive of, 398.

parties defendant in actions to set aside need not include persons having no interest in the property, 776.

presumption of fraud from inadequacy of consideration, 395.

purchaser from fraudulent grantee, when protected, 403.

purchaser under must not participate in the fraudulent intent of the grantor, 395.

purchaser under when protected against creditors of grantor, 395.

purchaser with notice from purchaser without notice, 403.

subsequent creditors, when may avoid, 399.

to prevent collection of alimony, 397.

voluntary, when are, 402.

GARNISHMENT of exempt property or credits, 73.

of foreign corporations, 455.

GIFTS from husband to wife, 212.

imperfect, decisions sustaining, 203, 206.

imperfect, do not create trusts, 204.

imperfect, equity may aid in favor of husband or wife or parent or child, 193.

imperfect, equity when will not aid or perfect, 193.

GRAND JURY, bias, as a ground for quashing an indictment, 304.**HIGHWAYS, municipal liability for defects in, 607.****HOMESTEAD, crops raised on, whether subject to execution, 493, 494.**

distinction between and homestead right, 492.

estoppel to claim cannot arise from declarations, 495.

excess over and above amount exempted as homestead, whether subject to execution, 505.

increase in value of by reason of improvements, 495, 496.

judgment existing prior to declaration of homestead, lien of, 496.

judgment liens, abandonment of homestead, effect of upon, 501.

judgment liens, cases holding homestead to be subject to, 503, 504.

judgment liens, excess over and above homestead, whether subject to, 505.

judgment liens, lands purchased for homestead purposes, whether subject to, 502.

judgment liens, once attached to cannot be divested by subsequent legislation, 497.

judgment liens, whether attach on conveyance or abandonment of homestead, 498, 499.

judgment liens, whether attach to existing homesteads, 498.

not exempt from debts existing before the enactment of homestead laws, 495.

obligation of contracts cannot be impaired by statutes respecting, 497, 498.

occupancy of land, when not essential to existence of, 503.

proceeds of, whether exempt from execution, 503.

removal from state, whether forfeits right to, 495.

renting of does not destroy homestead right, 494.

waste upon, creditor's right to enjoin, 495.

whether is an estate in land, 495.

HUSBAND AND WIFE, community property, conveyance of by husband, 872.

estoppel of wife to deny liability of her separate estate, 512.

husband's implied authority to act as agent of his wife, 512.

interests of in the community property, 872.

partnership between, 839, 340.

purchase of husband in ignorance of his having a wife estops both from setting up her rights, 871-874.

INSURANCE, conditions against property becoming vacant or unoccupied, 598.

contract of, where deemed to have been made, 771.

foreign corporations, retaliatory statutes against, 599.

waiver of proofs of loss, 598.

when severable, 563.

- JUDGMENTS**, attorneys, collateral attack upon because of want of authority of, 519, 520.
 confessed by one partner in the name of the firm, 688.
 foreign, presumption of jurisdiction, 434.
 homesteads, lien of upon, 496-505.
 sureties, when bound by judgments against principals, 447.
- LATERAL SUPPORT**, liability of municipal corporations for interfering with in grading streets, 845-849.
- LIEN** of judgments against homesteads, 496-505.
- LIBEL**, definition of, 639.
 innuendo, office of, 639.
 presumption of injury from, 639.
 upon public officers, 666.
- MANDAMUS**, relator, who may be, 40.
 to compel a court to take jurisdiction of a case, 43.
 to enforce private rights, 40.
- MARRIAGE**, valid where made, when will be held valid elsewhere, 353.
- MARRIED WOMAN**, contract of, to what extent binding, 339.
 partnership, power of to become member of, 339, 340.
- MASTER AND SERVANT**, liability of master to servant because of joint negligence of himself and of a fellow servant, 284.
 minor employees injured by orders to which obedience might have been refused, 284.
 vice principal, liability of master for neglects of, 284.
- MECHANICS' LIEN**, extends only to materials actually used, 123.
- MUNICIPAL CORPORATIONS**, consequential injuries, liability for, 846.
 crimes, power to punish when made criminal by state laws, 379.
 damaging of private property, by what prohibited, 850.
 dedication of streets does not authorize injury to private property in their improvement, 850.
 grading of streets, liability for injuries inflicted upon adjacent property by, 847-849.
 injunction against grading of streets by, before injuries to private property are ascertained and compensated, 850.
 lateral support of lots, liability for removing in grading streets, 845-849.
 liability of officers acting in good faith, 27.
 liability of officers trespassing upon private property, 27.
 nuisances, liability for abating, 25.
 nuisances, liability for licensing, 27.
 nuisances, power to abate, 25.
 officers of, when not answerable for, 379.
 officers of, when not bound by acts of, 25.
 pleading founded upon tort, when shows liability of city, 28, 29.
 pleading, whether necessary to aver that acts complained of were authorized, 28, 29.
 public buildings, not answerable for injuries resulting from condition of, 371.
 taking of private property by, what constitutes, 846.
 torts committed by officers or agents of, nonliability for, 27.
 torts, pleading, when discloses liability for, 28.
 trespass upon private property, liability for, 27.
ultra vires, defense of, when may be sustained, 26.

MUNICIPAL CORPORATIONS, *ultra vires*, no liability for acts which are, 28.
ultra vires, what acts are, 28.

NAVIGABLE WATERS, rights of owners of land bounded by, 668.

NEGLIGENCE, joint liability for, 56.

NEGOTIABLE INSTRUMENTS, attorney's fees, agreement to pay, whether destroys negotiability of, 106.

signing by officers of corporations, parol evidence respecting, 110.

NUISANCE, grantor or lessor of premises, when answerable, 267.

OFFICIAL BONDS, alteration of, when releases sureties, 898.

liability of sureties, when continues after expiration of the original of office, 898.

PARTNERSHIP between husband and wife, 339, 340.

dormant partner, withdrawal of, notice of, to whom must be given, 112.

sealed instruments, power of one partner to execute for the firm, 688.

PLEADING, corporations, acts or torts of, how may be averred, 28, 29.

municipal corporations, acts or torts of, how may be averred, 28, 29.

PRESUMPTION, as to laws of another state, 257.

PUBLIC OFFICE, eligibility to defined, 119, 120.

PUBLIC OFFICERS, salary to be earned by in the future is not assignable, 248.

RAILWAY CORPORATIONS, tickets limited as to time, 796.

SALES, contracts for, when deemed wagering contracts, 703.

SPECIFIC PERFORMANCE, description, what sufficient to justify a decree for, 141.

grounds for refusing, 677.

STATUTE OF LIMITATIONS, concealment of cause of action, 85.

judgment to take debt out of, 720.

relief from in equity, 92.

STREET RAILWAYS, duties of conductors and gripmen to avoid accidents, 682, 684.

public streets, right of in, 684.

TELEGRAPH CORPORATIONS, mental suffering, recovery for, when allowable, 831, 832.

notice of object of message must be taken from its contents, 831.

TENANT FOR LIFE, right of to cut and use timber, 242.

TRUST, VOLUNTARY, acceptance of by beneficiaries is not required, 214.

acceptance of by trustee is not essential, 214.

against whom may be enforced, 216.

assignments of equitable interests will not be perfected in equity, 200.

banks, deposit of money in effect of depositor's retaining control of until his death, 224.

banks, deposit of money in name of one who has no knowledge thereof, 223.

banks, deposit of money in parol evidence to rebut presumption that it was in trust, 220.

banks, deposit of money in, when deemed evidence of a gift to the person in whose name the deposit is made, 221.

banks, depositing money in when creates, 220.

choses in action, creating by assignment, 210.

consideration for, 190, 191.

creating by assignment of equitable interests, 208, 209.

- TRUST, VOLUNTARY**, creating by assignment of choses in action, 210.
 creating by assignment of moneys in bank, 210.
 creating by assignment of stocks, 209, 210.
 creating by delivery of property to one person with direction to hold in trust for another, 200.
 creating by making deposits in bank for or in name of another, 219, 220.
 creation of by conveying legal title to another person, 200.
 creation of to commence after donor's death, 201.
 creditors, trust in favor of is presumed to have been accepted, 219.
 creditors, trust in favor of may be revoked unless it has been accepted, 219. •
 creditors, who may avoid, 216, 217.
 declaration of, effect of retention of by the trustor, 212, 213.
 declaration of, is equivalent to transfer of legal title, 201.
 declaration of, made without consideration, 202.
 declaration of, must be unequivocal, 202.
 declaration of, will be enforced when contract will not be, 201.
 declarations creating, illustrations of, 207, 208.
 defeating by subsequent transfer by the trustor, 217, 218.
 defined, 190.
 delivery of property without intent to create, 201.
 delivery of subject of, when essential, 213.
 distinction between and gifts, 190.
 equity, when will aid as against settler, 191, 192.
 equity will not aid imperfect, 196, 197, 200.
 evidence to prove acceptance of, 216.
 executory, agreement to create in the future, 203.
 executed and executory, distinction between, 190, 192.
 formal requisites of instruments creating, 195.
 fraud, revocation of for, 219.
 gifts from husband to wife, how far sustained by declarations of, 212.
 gifts, imperfect, decisions sustaining, 205, 206.
 gifts, imperfect, do not create, 204.
 husband and wife, gifts or transfers from him to her, how far sustainable as, 212.
 imperfect, equity may aid in favor of husband or wife, or parent or child, 193.
 imperfect, relatives in whose favor equity will not enforce, 193.
 imperfect transfers will not be converted into, 190.
 insurance policies, creating by voluntary settlement of, 211.
 intention of the donor is the test for determining whether a trust has been created or not, 202.
 intention of the donor must be expressed, 202.
 intention to create is not alone sufficient, 202.
 intention to create partly executed, 202, 203.
 invalid or imperfect conveyance of legal title will not create, 200.
 is enforceable against the trustor and persons claiming under him, 217.
 is not created by an intention to create, 204.
 is not created by an invalid attempt to transfer property, 203.
 is not created by declaration that another person is entitled to the property, 203.
 is not created by declaration that one person intends to buy property for another, 203.

TRUST, VOLUNTARY, mistake, omission of power of revocation, whether evidence of, 219.

mistake, revocation of for, 219.

modes of creating, 200.

no particular form of words is required to create, 204.

not to take effect until after donor's death, 215.

notice of to donee is not essential, 224.

once perfect is irrevocable, 198.

parol declaration of, 190, 195.

partly executed and partly executory, 198.

promise to give property does not create, 204.

purchaser who may avoid, 216, 217.

reservation repugnant to the granting clause, 179.

retention by grantor of instrument creating, effect of, 212.

revocation of by the trustor, 217, 218.

revocation of incomplete trust, 218.

revocation of on the ground of fraud or mistake, 219.

revocation of, power of may be reserved, 197.

revocation, reservation of power of does not invalidate unless it is exercised, 217.

settler may create by declaring that he holds property for a beneficiary, 190, 191.

settler must do every act necessary to a transfer, 189.

stocks, creating by assignment of, 210.

testamentary dispositions of property do not create, 215, 224.

under seal, whether may be enforced though made without consideration, 193-195.

what required to complete or make perfect, 192.

when irrevocable, 218.

whether has been created, is a question of fact, 216.

words which will create, 195, 196.

writing creating may consist of an answer, 195.

writing creating, mistake in, 195.

writing creating must show who are beneficiaries of, 195.

writing is essential to create respecting real property, 195.

TRUSTS, when subject to execution for debts of beneficiary, 716.

VENDOR AND VENDEE, options to purchase, nature and effect of, 725.

WAGERING CONTRACTS, recovery of money remaining at close of transaction, 602.

WILLS, pretermitted heirs, declarations of testator respecting, 359.

pretermitted heirs, rights of when cut off by, 349.

reformation and construction of, 73.

INDEX.

ABANDONMENT.

See HIGHWAYS, 2; MARRIAGE AND DIVORCE, 2.

ABATEMENT.

1. **ABATEMENT OF ACTION BY PENDENCY OF ATTACHMENT IN ANOTHER STATE.** — The right of the plaintiff to prosecute his action in the courts of his own state cannot be defeated by the pendency of attachment proceedings in another jurisdiction by the creditor there to reach the debt owing to the plaintiff by the defendant, where the only claim of jurisdiction by the foreign court rests upon statutory authority to seize the debt by and through process against the agent of a corporation in this state, which owes the debt, which agent resides in the state where the seizure is made. *Douglas v. Phenix Ins. Co.*, 442.
2. **ABATEMENT OF ONE ACTION BY ANOTHER.** — THE PENDENCY OF AN ACTION IN ANOTHER STATE between the same parties for the same cause does not abate the suit. *Douglas v. Phenix Ins. Co.*, 442.

See INFANTS, 4.

ABUTTING.

See MUNICIPAL CORPORATIONS.

ACCIDENT.

See CARRIERS, 5; HIGHWAYS, 2, 4; NEGLIGENCE, 2.

ACCOUNT BOOKS.

See APPEAL, 7.

ACCOUNTING.

See COLLATERAL SECURITY, 2.

ACCOUNTS.

See GUARDIAN AND WARD, 4; TRIAL, 2.

ACKNOWLEDGMENT.

THE ACKNOWLEDGMENT OF A DEED to a trustee taken before him as a notary public is void, although he had no pecuniary interest in the deed, and after it was executed declined to act under it and another trustee was substituted for him, who made the sale of the property upon the contingency authorized by the deed. *Rothschild v. Daughar*, 811.

See DEEDS, 6.

ACTIONS.

1. **WHEN AND HOW COMMENCED.** — An action is commenced when a summons and complaint are delivered to the sheriff with the intent that they shall be actually served upon the defendant. *Montague v. Stella*, 736.
2. **PRACTICE.** — A STATUTE DECLARING THAT SUITS IN EQUITY shall be in form either an action of contract or of tort, does not abolish the distinction between legal and equitable suits or remedies. A suit must, notwithstanding such statute, be either an action at law or a suit in equity, and cannot be both, or partly one and partly the other. *Worthington v. Waring*, 294.
3. **DEBTOR AND CREDITOR — DAMAGES.** — Notice by a third person to a debtor not to pay his creditor, by reason of which the latter is compelled to sue to recover the sum due him, is not sufficient ground to support an action for damages. *Norcross v. Otis*, 669.
4. **INDUCING A PERSON TO BREAK HIS CONTRACT WITH THE PLAINTIFF IS NOT IN ITSELF AN ACTIONABLE WRONG**, and the mere fact that the defendant was actuated by malicious motives and by a purpose of injuring the plaintiff will not so change the character of what he has done as to convert it into a tort for which damages can be recovered. *Bourlier v. Macauley*, 171.
5. **CONTRACT, ACTION FOR PROCURING THE VIOLATION OF, WHETHER MAINTAINABLE.** — An action cannot, in general, be maintained for inducing a third person to break his contract with the plaintiff. The only exceptions of which this rule admits are where apprentices, menial servants, and others, whose sole means of living is by manual labor, are enticed to leave their employment, or where a person has been procured, against his will or contrary to his purpose, by coercion or deception of another to break his contract. *Chambers v. Baldwin*, 165.
6. **INDUCING THIRD PERSON TO BREAK CONTRACT WITH PLAINTIFF, ACTION FOR, WHEN NOT MAINTAINABLE.** — No cause of action is stated in a petition which alleges that the plaintiffs, being the owners of a theater, made a contract with the manager of a dramatic performer whereby it was agreed that certain performances were to be given, and that they complied with this contract in every respect, but that the defendant, the owner of a rival theater, although he had notice of the contract, with malicious intent to injure the reputation of the plaintiffs, wrongfully induced and procured the said dramatic performer to refuse to perform at their theater, and made a contract with the manager, which was carried out, for the giving of performances on the identical days on which it was agreed that they should be given at the plaintiffs' theater. *Bourlier v. Macauley*, 171.
7. **CONTRACT, ALLEGATIONS INSUFFICIENT TO SUSTAIN AN ACTION FOR PROCURING VIOLATION OF.** — No cause of action is stated by a petition which alleges that the plaintiff had made a contract with one W. whereby he sold and agreed to deliver to him during a certain period a quantity of tobacco; that the defendant, knowing of the existence of said contract, maliciously, and, on account of his ill-will to the petitioner, advised and procured W. who would else have kept and performed the agreement, to break it; that W. was at the time known by the defendant to be and now is insolvent; and that the petitioner bring suit because he is thus left without other redress. *Chambers v. Baldwin*, 165.

3. **MALICIOUS MOTIVES CANNOT MAKE A LAWFUL ACT WRONGFUL.** — A lawful act, done in a lawful manner, cannot be transformed into a legal wrong by the mere fact that the person doing it is actuated by a bad motive. *Chambers v. Baldwin*, 165.
 4. **MALICIOUS MOTIVES CANNOT MAKE A LAWFUL ACT WRONGFUL.** — Whether an act is a legal wrong depends upon its nature and quality, not upon the motives of the person doing it. Malicious motives may make a bad case worse, but cannot make that wrong which in its own essence is lawful. *Bourlier v. Macaulay*, 171.
- See ABATEMENT; APPEAL, 1, 2; ATTACHMENT, 2; COLLATERAL SECURITY, 2; CONTRACTS, 14; CORPORATIONS, 22; DAMAGES, 1; FRAUDULENT CONVEYANCES, 8; LIMITATIONS OF ACTIONS, 6; MALICIOUS PROSECUTION; MASTER AND SERVANT, 10; NUISANCE, 7; RAILROADS, 23.

ADMIRALTY.

1. **JURISDICTION.** — If THE MARITIME LAW GIVES A LIEN and a proceeding *in rem* to enforce it, a state statute cannot give the state courts concurrent jurisdiction by creating a similar statutory lien. *Atlantic Works v. Tug Glide*, 305.
2. **JURISDICTION OVER VESSELS.** — A state statute creating a lien against vessels for repairs made in their home port, where the maritime law does not give such lien, and authorizing the enforcement of the lien in the courts of the state, is valid. *Atlantic Works v. Tug Glide*, 305.

ADMISSIONS.

See MARRIAGE AND DIVORCE, 3.

ADULTERY.

See MARRIAGE AND DIVORCE, 3-6; 14, 15.

ADVANCES.

See FACTORS.

ADVERSE POSSESSION.

See HIGHWAYS, 1; MUNICIPAL CORPORATIONS, 17.

AFFIDAVITS.

See PLEADING, 5.

AGENCY.

1. **EVIDENCE OF AGENCY.** — Evidence of parties who have dealt with a principal through his agent is competent to show the character of the agency. *Austrian v. Springer*, 350.
2. **PRESUMPTIONS AS TO AUTHORITY OF AGENT.** — Parties dealing with an agent have a right to presume that his agency is general, and not limited, and also to presume that one known to be an agent is acting within the scope of his authority. *Austrian v. Springer*, 350.
3. **AUTHORITY OF SOLICITING AGENT.** — Agents sent out by manufacturers to solicit orders, are held out to the trade as having authority to act according to general usage, practice, and course of business conducted by such manufacturers through such agents; and the question of what is usual or necessary to be done by such agents is ordinarily for the jury. *Austrian v. Springer*, 350.

4. **AUTHORITY OF AGENT.** — Whatever attributes properly belong to the character bestowed upon an agent will be presumed to exist, and they cannot be cut off by private instructions of which those who deal with the agent are ignorant. Among these attributes is the power to do all that is usual and necessary to accomplish the object for which the agency is created. *Austrian v. Springer*, 350.
5. **EXTENT OF AUTHORITY OF AGENT.** — The principal is bound, as to third persons dealing with his agent and acting in ignorance of any limitations on his authority, by his apparent, and not by his express, authority. The authority of the agent depends, so far as it involves the rights of innocent third persons relying thereon, upon the character bestowed, rather than upon the instructions given. *Austrian v. Springer*, 350.
6. **ORDER FOR GOODS, WHEN BINDING ON PRINCIPAL.** — When a general agent procures an order for goods to be shipped by his principal, and such order describes the goods and states the prices and date of shipment, and is signed by the party ordering, to whom the agent gives a receipt for the order containing the same statement, a valid contract of sale is created, which is binding on the principal. *Austrian v. Springer*, 350.
7. **LIABILITY OF PRINCIPAL IN EXEMPLARY DAMAGES FOR ACTS OF AGENT.** A principal, whether a corporation or an individual, may be held liable in exemplary damages to a third person on account of a wrongful, wanton, and malicious act of his agent, done within the scope of his agency, although such act is not previously authorized nor subsequently ratified by the principal. *Rucker v. Smoke*, 758.
- See **ABATEMENT**, 1; **BROKERS**; **CORPORATIONS**, 9, 10, 14, 15, 17, 21; **FACTORS**; **HUSBAND AND WIFE**, 1; **INSURANCE**, 3, 6, 8-11, 16; **LIMITATIONS OF ACTIONS**, 4-6; **MUNICIPAL CORPORATIONS**, 15, 16; **NEGOTIABLE INSTRUMENTS**, 8; **OFFICERS**, 2; **RAILROADS**, 2; **TELEGRAPH COMPANIES**, 3; **VENDOR AND PURCHASER**, 4.

ALIMONY.

See **MARRIAGE AND DIVORCE**, 10-20.

ALTERATION.

See **MARRIAGE AND DIVORCE**, 10-20; **OFFICERS**, 4.

AMENDMENTS.

See **MARRIAGE AND DIVORCE**, 7; **MECHANIC'S LIEN**, 5.

ANIMALS.

See **BAILEMENT**; **MUNICIPAL CORPORATIONS**, 2, 4, 12; **STATUTES**.

APPEAL.

1. **JUDGMENTS OR ORDERS FROM WHICH AN APPEAL WILL LIE** are those which either terminate the action itself or operate to divest some right in such a manner as to put it out of the power of the court making the order to place the parties in their original condition after the expiration of the term. *Harrison v. Lebanon Waterworks*, 180.

2. **AN APPEAL WILL LIE FROM AN ORDER** which refuses to grant the petition of persons asking to be made parties to a suit, or has the effect of dismissing an action as to one or more plaintiffs, or operates to deprive one or more defendants of the benefit of an answer filed. In each of these cases there is a final determination of the action as regards the particular party or parties affected by such order. *Harrison v. Lebanon Water-works*, 180.
3. **JURY TRIAL — PROBATE PRACTICE** — Whether issues shall be framed for submission to a jury on the hearing of an appeal in probate rests in the discretion of the presiding judge, and the exercise of such discretion cannot be reviewed upon appeal where, upon the record, the appellate court has no means of determining whether or not the judge's refusal to frame and submit issues was right or wrong. *Doherty v. O'Callaghan*, 258.
4. **REVIEW OF ERROR** — The action of the court below in sustaining a motion to strike out part of a petition will not be reviewed on appeal unless assigned as error on the motion for a new trial. *Williams v. Chicago etc. R'y Co.*, 403.
5. **SPECIFIC PERFORMANCE — INSUFFICIENCY OF DESCRIPTION** — Where a part of the description in a written contract for the exchange of land is too indefinite and uncertain to be enforced in the absence of extrinsic evidence to identify the land to which the description applies, and the trial court, in an action for specific performance of the contract, has improperly refused to permit the plaintiff to introduce such extrinsic evidence, but the error has not been so set out on the record that it can be corrected on appeal, the appellate court will not on that account disregard the remainder of the description, nor treat the contract as a nullity, but, if the plaintiff is willing to take a conveyance of that portion of the land of which the description is sufficiently certain as an adequate performance of the contract, a decree of the trial court in his favor will be modified so as to give him the option of accepting that portion within a given period or of having the decree reversed, and the cause remanded for a new trial. *Bacon v. Leslie*, 134.
6. **NEGLIGENCE — DAMAGES — INCONSISTENCY BETWEEN SPECIAL FINDINGS AND VERDICT** — When a trial court in an action brought by the father and next friend of a minor to recover for personal injuries received by the minor, charges the jury that if they find for the plaintiff, there can be no recovery for loss of time, as the injured person is a minor, nor for his board, care, nursing, or medical expenses or attendance, and the jury, while specially finding that they allow nothing for loss of time, medical attendance, expenses for nursing and sickness, physical pain, mental suffering, permanent injury or exemplary damages, also render a verdict for "one thousand dollars as damages for injuries received," the verdict is inconsistent with the instructions and the special findings, and cannot be sustained. *Parkinson Sugar Co. v. Riley*, 123.
7. **NONPREJUDICIAL IRREGULARITY** — Where the plaintiff, in an action against the owner of a building to recover the price of materials furnished therefor, and to foreclose a mechanic's lien thereon, testifies, without objection, that he furnished the lumber for which suit was brought, and that the amount charged was the ordinary and reasonable price, and his account books, though not formally in evidence, have been brought into court and shown, in the cross-examination of the plaintiff, to correspond with the testimony he had previously given, the

irregularity of not producing the books at the time the plaintiff was establishing his accounts, is not a prejudicial error which will justify the reversal of a judgment for the plaintiff. *McGarry v. Averill*, 120.

See ATTORNEY AND CLIENT, 2; ERROR, 2; LIBEL, 11; MECHANIC'S LIEN, 1.

APPLICATION.

See MORTGAGES, 3, 4.

APPRENTICES.

See ACTIONS, 5.

ARBITRATION.

See CONTRACTS, 11-13.

ARREST.

See MALICIOUS PROSECUTION.

ARTICLES OF INCORPORATION.

See INSURANCE, 15.

ASSIGNMENT.

1. **ASSIGNMENT OF WAGES TO BE EARNED IN THE FUTURE.**—The transferee for value of wages to be earned in the future under an existing contract for the rendition of services during a specified period is invested with an equity which prevails over that of a creditor who afterwards seeks to attach the same wages. In such a case the wages, being the expected and natural product of the contract right of the employee, have a potential existence which renders them capable of assignment. *Manly v. Bissler*, 242.

2. **ASSIGNMENT OF NOTES WITHOUT DELIVERY, WHEN WILL BE ENFORCED.** Where the maker of certain promissory notes is requested by one who holds them under the will of the payee to execute new ones for the same amounts, but refuses to do so for the reason that he has not received proper credits, and only consents to sign them upon receiving a promise from the holder that they are to be assigned to his children, there is a valuable consideration to support a subsequent assignment of the notes by a written indorsement thereon, and, although the holder of the notes does not deliver them to the assignees, such assignment will be enforced by compelling a delivery. *Williamson v. Yager*, 184.

See HOMESTEAD, 7; MECHANIC'S LIEN, 7; NEGOTIABLE INSTRUMENTS, 7; RAILROADS, 18; SPECIFIC PERFORMANCE, 2.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

PREFERENCE OF A CREDITOR by a failing debtor, who soon afterwards makes an assignment of his property for the benefit of his creditors generally, is not fraudulent, unless it appears that the debtor's intention to make such assignment was known to the creditor, and that the transaction by which the preference was obtained was separated from the assignment for the purpose of obviating the annulment which would follow if it were contemporaneous with or included in the assignment itself. *Benham v. Ham*, 851.

See DEBTOR AND CREDITOR.

ASSOCIATIONS.

1. **BY-LAWS HOW FAR BINDING ON MEMBERS OF.** — Since any member of a voluntary association can withdraw therefrom whenever he pleases, the by-laws which are adopted by such association will, as a general rule, be held binding upon him. *Huston v. Reutlinger*, 225.
2. **WHEN** the suspension or expulsion of a member will necessarily result in affecting his financial standing, as well as in depriving him of the use of property that is common to the whole association, however insignificant its value, it is always competent for the court to issue an injunction to prevent the enforcement of an improper by-law against such member. *Huston v. Reutlinger*, 225.
3. **CONTRACTS OF EMPLOYMENT, ILLEGAL RESTRAINTS UPON.** — In all classes of business the employer and employee should be allowed to contract with one another, unrestrained by third persons who may demand that the one shall give more or the other receive less, and restrictions placed upon these rights by combinations or associations of men will, as a general rule, be deemed illegal and void. Therefore an injunction will issue restraining the suspension or expulsion of a member of a voluntary association of underwriters for violating a by-law by which the majority of the association have undertaken to prescribe the number of solicitors which each member shall employ, the time of employment, and the compensation to be paid them, as well as to forbid contracts with solicitors making their salary depend on the number of risks they secure, and to prohibit members from employing a solicitor within a certain period after he has severed his connection with another member. *Huston v. Reutlinger*, 225.

ASSUMPSIT.

See RAILROADS, 6.

ASSUMPTION OF RISK.

See MASTER AND SERVANT, 1.

ATTACHMENT.

1. **JURISDICTION.** — In attachment proceedings, the res must be within the jurisdiction of the court issuing the process in order to confer jurisdiction. *Douglass v. Phenix Ins. Co.*, 448.
2. **PRACTICE.** — PERSONS CLAIMING PROPERTY WHICH HAS BEEN SEIZED UNDER ATTACHMENT ARE NOT COMPELLED TO INTERVENE IN ATTACHMENT SUIT and try their right of property there, but may maintain an independent action to recover their value. *Harris v. Tenney*, 796.
3. **CONFLICT OF LAWS.** — The *situs* of debts and obligations is at the domicile of the creditor, but the creditor of a nonresident may, in this state, attach a nonnegotiable debt or credit owing or due to him by a person within the jurisdiction where the attachment issues. To this extent the laws of the state, for the purposes of attachment proceedings, may fix the *situs* of the debt at the domicile of the debtor. *Douglass v. Phenix Ins. Co.*, 448.
4. **EXEMPTION—WAIVER OF.** — The exemption of wages provided in section 4589, of the general statutes of Kansas, is created for the benefit of the debtor's family, and cannot be waived by him. Hence, although the lease, under which a debtor occupies his dwelling, contains a waiver of

the benefit of the exemption laws of the state, money which is due to him for personal services rendered during the period covered by the statute and which is needed for the support of his family, is not subject to garnishment at the suit of the landlord. *Burke v. Finley*, 132.

5. **ERROR OF DISSOLVING — PRIORITIES.** — The lien of an attachment is ended, when the attachment is dissolved and after such dissolution, the owner of the property attached can dispose of it as he sees fit, whether it has been actually turned over to him by the officer or not. Hence the rights of one to whom property has been transferred by a *bona fide* bill of sale, after an attachment thereon has been dissolved, are superior to those acquired by a second writ of attachment, which is handed to the sheriff and indorsed by him with the ordinary levy on the same day as the bill of sale is given, but under which no actual levy is made until some days afterwards. *Anderson v. Land*, 875.
6. **GARNISHMENT OF MONEY DUE IN ANOTHER STATE — EXEMPTIONS.** — When the wages of a nonresident debtor earned and payable in another state are sought to be subjected to garnishment in Illinois, the exemption law of that state and not of the state of the debtor's domicile will control in the absence of statute to the contrary. *Wabash R. R. Co. v. Dougan*, 74.
7. **GARNISHMENT OF MONEY DUE IN ANOTHER STATE.** — A railroad company organized and having its domicile in another state, but doing business in Illinois, is subject to garnishment in the latter state by a resident of such other state for a debt owing by it to another resident of that state, and the motives which prompt the garnishing creditor in thus pursuing his legal rights cannot be questioned. *Wabash R. R. Co. v. Dougan*, 74.
8. **GARNISHMENT — USURY AS DEFENSE.** — A garnishee in an attachment suit cannot set up usury in the indebtedness for which the judgment was rendered against the principal defendants, or otherwise impeach the consideration of such judgment. These matters are available only in favor of the principal debtors. *Wabash R. R. Co. v. Dougan*, 74.

See **ABATEMENT; ASSIGNMENT; CREDITOR'S SUIT, 2; JURISDICTION, 1; SALE, 10-12.**

ATTAINDER.

1. **CIVIL DEATH. — STATUTES REGULATING TIME WHEN DESCENT IS CAST,** and fixing such time as the death of the ancestor, refer to his actual physical death, and not to any civil death resulting from his conviction and imprisonment for crime. *Davis v. Laning*, 784.
2. **CIVIL DEATH. — ONE SENTENCED TO IMPRISONMENT FOR LIFE** in the penitentiary as a punishment for crime is not civilly dead, nor can anyone recover property as his heir at law while he remains alive. *Davis v. Laning*, 784.

ATTESTATIONS.

See **JUDGMENTS, 3.**

ATTORNEY AND CLIENT.

1. **JUDGMENTS — ATTORNEY'S AUTHORITY — PRESUMPTION.** — A party about to purchase land under a judgment of a court having jurisdiction of the parties and the subject-matter is not bound to inquire into the authority of the attorneys who profess to represent such parties. Such authority is conclusively presumed. *Williams v. Johnson*, 513.

CONFIDENTIAL COMMUNICATIONS. — Where a prisoner who has begun proceedings in the nature of a writ *coram nobis* to obtain relief from his sentence, makes a deposition in which he states that the relation of attorney and client had never existed between him and one K., and K., on the other hand, subsequently testifies at the trial that at the time he held with the prisoner a certain conversation which the state is seeking to introduce in evidence, he was employed as the attorney of the prisoner, and that the conversation was held between them in the relation of attorney and client, the exclusion of evidence of that conversation by the trial court, on the ground that it consisted of confidential communications, cannot, on appeal, be pronounced erroneous. *State v. Calhoun*, 141.

EVIDENCE — PRIVILEGED COMMUNICATIONS TO ATTORNEY. — AFTER A TESTATOR'S DEATH and when his will is presented for probate, his attorney, who had drawn it, should be allowed to testify as to the directions given him by the testator, so that it may appear whether the instrument presented for probate is or is not the will of the alleged testator. *Doherty v. O'Callaghan*, 258.

See CONTRACTS, 8, 9; JUDGMENTS, 1.

ATTORNEY'S FEES.

See MORTGAGES, 5; NEGOTIABLE INSTRUMENTS, 5-7.

AUTHENTICATION.

See JUDGMENTS, 3.

BAILMENT.

WARRANTY. — A LIVERY STABLE KEEPER DOES NOT WARRANT OR INSURE THE SUITABLENESS OF EVERY HORSE he lets. Hence, though he lets a horse to be ridden and it runs away and injures its rider, the latter cannot recover for such injury when the stable keeper has not been guilty of any negligence and did not know of the horse's having any defects or vicious habits. *Copeland v. Draper*, 314.

See CARRIERS, 1; COLLATERAL SECURITY.

BANKS.

See SURETYSHIP, 1, 2.

BENEFICIARIES.

See TRUSTS, 6-8.

BETS.

See WAGERS.

BILLS AND NOTES.

See NEGOTIABLE INSTRUMENTS.

BILLS OF LANDING.

See CARRIERS, 1.

BILLS OF SALE.

See ATTACHMENT, 5.

BONA FIDE PURCHASERS.**See TRUSTS, 8.****BONDS.****See OFFICERS, 2-4; SURETYSHIP.****BOODLE.****See DEFINITIONS; LIBEL, 2.****BOYCOTTING.****See INJUNCTIONS, 1.****BRIBERY.****See DEFINITIONS; LIBEL, 2.****BRIDGES.****See MUNICIPAL CORPORATIONS, 7, 8.****BROKERS.**

- 1. WAGERING CONTRACTS — DEPOSIT WITH BROKER WHEN MAY BE RECOVERED.** — When a gambling transaction in stocks is closed between the principal and his broker, the account rendered and settled, and the entire profit paid over, leaving in the broker's hands only the original deposit recognized by both parties as the principal's money in the broker's hands in contemplation of new transactions, the principal may recover the amount of such deposit from the broker before he enters into further transactions and he cannot set up the illegal character of the former transaction in defense. *Peters v. Grim*, 599.
- 2. RIGHT TO RECOVER COMPENSATION FROM BOTH VENDOR AND VENDEE.** — When the same person acts as agent on commission for both the vendor and vendee in the sale and purchase of land, neither knowing that such agent is acting for the other, and both relying upon his knowledge as to the value of the land, he cannot, after receiving a commission from the vendor, also recover commissions from the vendee. *McDonald v. Maltz*, 331.
- 3. RIGHT TO RECOVER COMPENSATION FROM BOTH VENDOR AND VENDEE.** — A broker who simply brings the parties together, and has no hand in the negotiations between them, they making their own bargain without his aid or interference, can legally receive compensation from both of them, although each is ignorant of his employment by the other. *Montross v. Eddy*, 323.
- 4. RIGHT TO RECOVER COMPENSATION FROM BOTH VENDOR AND VENDEE.** — A commission dealer in lands who simply acts as a go-between to bring the vendor and vendee together to make their own bargain, may recover from either or both such sum as was agreed upon for the services rendered. *Montross v. Eddy*, 323.
See INSURANCE, 9; NEGOTIABLE INSTRUMENTS, 11; WAGERS, 2.

BUILDING CONTRACTS.**See CONTRACTS, 11-18; MECHANICS' LIEN.**

BURDEN OF PROOF.**See ERROR, 3; LIMITATIONS OF ACTIONS.****BY-LAWS.****See ASSOCIATIONS; CORPORATIONS, 4; MUNICIPAL CORPORATIONS, 4.****CANCELLATION.****See GUARDIAN AND WARD, 3.****CARRIERS.**

- 1. DUTY TO DELIVER GOODS TO TRUE OWNER UPON DEMAND.** — A common carrier receiving goods for transportation from one person, giving him a bill of lading therefor, is not bound to deliver them upon demand to a third person claiming to be their true owner; and a refusal to so surrender will not make the carrier liable for the conversion of such goods at the suit of such third person. In such case the carrier may, however, if it chooses to do so, deliver the goods to the rightful owner, and then defend an action brought against him by his bailor to recover for their nondelivery by showing such delivery. *Kohn v. Richmond etc. R. R. Co.*, 726.
- 2. DUTY TO DELIVER GOODS TO TRUE OWNER UPON DEMAND UNDER LEGAL PROCESS.** — A common carrier receiving goods for transportation from one person is guilty of conversion in failing to deliver to their true owner, upon demand, only when such demand is made under and accompanied by legal process. *Kohn v. Richmond etc. R. R. Co.*, 726.
- 3. DUTY TO SURRENDER GOODS TO MORTGAGEE AFTER CONDITION BROKEN.** When, after goods are received from a mortgagor by a common carrier for transportation, their possession is demanded by an agent of the mortgagee claiming the latter to be the true owner, a refusal by the carrier to surrender the possession does not constitute a conversion of the goods; nor does the presence and silence of the mortgagor, when such demand is made and refused, constitute such an admission of the mortgagee's ownership as makes it the duty of carrier to deliver the goods under such demand. *Kohn v. Richmond etc. R. R. Co.*, 726.
- 4. WHEN EXCUSED FOR NONDELIVERY CAUSED BY AN ACT OF PUBLIC AUTHORITY.** — The exemption of a carrier from liability for the nondelivery of goods caused by the act or mandate of public authority extends to those cases in which the goods are taken from his possession by legal process against the owner, or in which they become, without his fault, obnoxious to the requirements of the police power of the state, and are injured or destroyed by its authority; as where they are infected with contagious disease, or are intoxicating liquors intended for use or sale in violation of the laws of the state, which require their seizure and destruction. But, in order to protect the carrier in such cases, it is necessary that the seizure be made without the procurement or connivance of the carrier; that the proceeding or process under which it was made was valid; and that the carrier gave prompt notice thereof to the owner. *Railroad Co. v. O'Donnell*, 579.
- 5. CARRIERS, HOW FAR EXCUSED FOR DELAY IN DELIVERING GOODS.** — A carrier is bound to provide sufficient and suitable means for the carriage of the goods of shippers, and to make delivery thereof with all convenient dispatch; and, while accidents will excuse delay, they do not put an end

to the contract. As soon as the impediment to the transportation of the property is removed, or can reasonably be overcome, the carrier must complete the contract without further delay. *Railroad Co. v. O'Donnell*, 579.

See EXPRESS COMPANIES; RAILROADS, 5-15; SALES, 13; TROVER, 2-4.

CERTIFICATES.

See CORPORATIONS, 1; JUDGMENTS, 3.

CHARTERS.

See CORPORATIONS, 7, 9, 10; LIMITATIONS OF ACTIONS, 1.

CHATTEL MORTGAGES.

EFFECT OF PROVISION ALLOWING MORTGAGEE TO SELL. — A chattel mortgage given to secure a *bona fide* debt, and authorizing the mortgagee to sell the goods and apply the proceeds to the extinguishment of the debt, is valid as against the other creditors of the mortgagor. *Benham v. Ham*, 851.

CHILDREN.

See INFANTS.

CHURCHES.

See JUDGES.

CIVIL DEATH.

See ATTAINDER.

COHABITATION.

See MARRIAGE AND DIVORCE, 2.

COLLATERAL ATTACK.

See HUSBAND AND WIFE, 10; JUDGMENTS, 1.

COLLATERAL SECURITY.

1. **DILIGENCE REQUIRED IN COLLECTING.** — When a creditor receives from his debtor notes or other securities as collateral he becomes a bailee thereof and as such he is bound to use ordinary diligence, such as persons usually exercise in reference to their own matters, in endeavoring to collect the collateral, and, for a failure to use such diligence, he is answerable for the loss resulting to his debtor. *Montague v. Stelts*, 736.
2. **DUTY OF CREDITOR — DEFENSE BY DEBTOR.** — When a creditor receives from his debtor either notes or other obligations of any kind of third persons, as collateral security for the payment of his debt, he cannot, in the absence of an express agreement to the contrary, maintain his action for the recovery of his debt without accounting for the collateral by showing either that he has collected it and applied it as a credit on the debt, or that he could not by the use of due diligence collect it. In such case the debtor is not compelled to claim damages for negligent loss arising from failure to use diligence to collect by separate action or counterclaim, but may interpose it as a defense to such action and thus require an accounting for the collateral by the creditor. *Montague v. Stelts*, 736.

See CORPORATIONS, 2-4; LIMITATIONS OF ACTIONS, 9; NEGOTIABLE INSTRUMENTS, 3.

C. O. D.

See EXPRESS COMPANIES.

COMBINATIONS.

See INSURANCE, 16.

COMMERCE.

1. **TRADE, MEANING OF — WHEN THE TERM DOES NOT COMPREHEND INTERSTATE COMMERCE.** — The word "trade," which was decided in the case of *In re Pinkney*, 47 Kan. 89, to comprehend the business of insurance, means trade between the citizens of the same state, and not trade between the citizens of different states or interstate commerce. *State v. Phipps*, 152.

2. **INSURANCE NOT COMMERCE.** — Issuing a policy of insurance is not a transaction of commerce. *State v. Phipps*, 152.

See INSURANCE, 16; INTERSTATE COMMERCE.

COMMISSIONS.

See BROKERS, 2-4.

COMMON CARRIERS.

See CARRIERS.

COMMON LAW.

THE COMMON LAW HAS EXISTENCE AND FORCE in Kansas in all cases, where it is not inconsistent with the constitution, statutes, institutions of the state, and where, without it, proper remedies for injustice and wrong, and for the redress of grievances would not be furnished. *State v. Calhoun*, 141.

See EVIDENCE, 1; HUSBAND AND WIFE, 7; INDEBTMENT.

COMMUNITY PROPERTY.

See HUSBAND AND WIFE, 9.

COMPENSATION.

See BROKERS, 2-4; CONTRACTS, 9.

CONCEALMENT.

See INSURANCE, 2; LIMITATIONS OF ACTIONS, 4-8.

CONFESSIONS.

See MARRIAGE AND DIVORCE, 3, 6.

CONFLICT OF LAWS.

See ABATEMENT; ATTACHMENT, 3, 6-8; CONTRACTS, 10; EQUITY, 3; EVIDENCE, 1; HUSBAND AND WIFE; INJUNCTIONS, 3; INSURANCE, 10-12; JURISDICTION, 2.

CONGRESS.

See INSURANCE, 16; INTERSTATE COMMERCE.

CONNECTING CARRIERS.

See RAILROADS, 8-11.

CONSIDERATION.

See ASSIGNMENT, 2; CONTRACTS, 1, 2; CORPORATIONS, 8, 12; FRAUDULENT CONVEYANCES, 1; TRUSTS, 2; VENDOR AND PURCHASER, 2.

CONSPIRACY.

See INJUNCTIONS, 2.

CONSTITUTIONAL LAW.

See STATUTES.

CONSTITUTIONS.

See COMMON LAW; ERROR, 3; INTERSTATE COMMERCE; MUNICIPAL CORPORATIONS, 2.

CONSTRUCTION.

See WILLS, 3-6.

CONSTRUCTION CONTRACTS.

See CONTRACTS, 11-18; MECHANIC'S LIEN, 5-7.

CONTEMPT.

JUDGMENT FINDING PERSON GUILTY OF, WHEN VOID. — The service of a summons, in an action against a corporation, upon one of its officials in his representative character is merely for the purpose of bringing it into court, and does not make him a party to the action in such a sense that he can, without further process be adjudged liable to the penalties of contempt for failing to deliver to the receiver appointed to take charge of the corporate property a portion of that property which he had in his possession before the commencement of the action. *State v. Ball*, 866.

CONTRACTORS.

See MECHANIC'S LIEN.

CONTRACTS.

1. **CONSIDERATION, SUFFICIENCY OF.** — A consideration moving from one person will uphold a promise to, or an agreement made with, a third person. *Williamson v. Yager*, 184.
2. **CONTRACTS ABOUT SEVERAL THINGS FOR A SINGLE CONSIDERATION, WHEN ENTIRE.** — The principle by which the courts are governed when they declare that a contract about several things, but with a single consideration in gross, is entire and not severable, is that it is impossible to affirm that the party making the contract would have consented to do so unless he had supposed that the rights to be acquired thereunder would extend to all the things in question. *Coleman v. Insurance Co.*, 565.
3. **CONTINUING OFFER TO SELL.** — When a proposition to sell is made to be accepted within a given time, it constitutes a continuing offer which, however, may be retracted at any time. But if at any time before it is retracted, it is accepted, such offer and acceptance constitute a valid contract. *Cooper v. Lansing Wheel Co.*, 341.
4. **PROPOSITION TO SELL WHEN DEEMED ACCEPTED.** — When a carriage manufacturer gives an order for such quantity of wheels as he may re-

- quire during a certain season at a specified price, and the order is accepted by the orderer and one or more lots of wheels are furnished thereunder, the order becomes a valid and binding contract for the entire season. *Cooper v. Lansing Wheel Co.*, 341.
5. **UNILATERAL CONTRACTS, WHEN BINDING.** — In suits upon unilateral contracts, the defendant is held bound if he has had the benefit of the consideration for which he has bargained. *Cooper v. Lansing Wheel Co.*, 341.
6. **TRUSTS — AGREEMENT BETWEEN STOCKHOLDERS OF COMPANIES, WHAT VOID AS TENDING TO MONOPOLY.** — An agreement by which a majority of the stockholders in several companies transfer their stock to trustees, who are required to hold the stock in trust for the transferors, and to exercise the power of controlling the affairs of the companies which the legal ownership of the majority of the stock confers, in such a manner as will be most conducive to the interests of all the parties to the agreement, tends to establish a virtual monopoly of the business for which the companies were organized, and is therefore contrary to public policy and void. *State v. Standard Oil Co.*, 541.
7. **CONTRACTS TO PROCURE LEGISLATION.** — Contracts which have for their subject-matter any undue interference with the creation of laws, or their due enforcement, are against public policy and void. *Spalding v. Ewing*, 608.
8. **LOBBYING CONTRACTS — CONTINGENT COMPENSATION.** — A contract to give an attorney or other person a certain percentage of a claim against the United States government for services in collecting it, is void as against public policy, when such services consist in procuring legislation compelling the payment of the claim. *Spalding v. Ewing*, 608.
9. **CONTRACTS TO PROCURE LEGISLATION — FEE CONTINGENT ON SUCCESS.** — An attorney may recover compensation for purely professional services performed in procuring legislation in which his client is interested; but when the agreement between attorney and client provides for compensation contingent on the amount recovered under such legislation when procured by the attorney, the contract is against public policy and cannot be enforced. *Spalding v. Ewing*, 608.
10. **CONFLICT OF LAWS — CAPACITY TO CONTRACT.** — When a contract is valid under the law of the state where it is made, it is valid everywhere as to matters bearing upon its execution, interpretation, and validity; but as to the capacity of the contracting party who resides in another state, the law of his domicile controls and prevails in an action brought in the latter state. *Armstrong v. Best*, 473.
11. **CONSTRUCTION CONTRACTS — ENGINEER'S ESTIMATES — PLEADING AND PROOF.** — When in an action to recover for work done under a construction contract which stipulates that the amount of work performed shall be determined by the estimates of a certain engineer, and whose determination shall be conclusive, the complaint sets out the contract and alleges that the engineer, though often requested, failed to make the measurements as required therein, and to certify them, and that his failure so to do was fraudulent and collusive with defendant, and this is denied by answer setting out the final estimate of the engineer, which is alleged in reply to be made in violation of the contract, and fraudulent, the plaintiff must show that the engineer has refused to make an estimate as required by the contract, after demand, before he can introduce evidence under a *quantum meruit* count in his complaint of the amount and value

of the work done; but he is not compelled to prove such refusal by the engineer himself, and may prove it by any witness who knows the facts. *Williams v. Chicago etc. R'y Co.*, 403.

12. **CONSTRUCTION CONTRACTS — ENGINEER'S ESTIMATES — CONCLUSIVENESS OF — PLEADING AND PROOF.** — In an action to recover for work performed under a construction contract which stipulates that the amount of work done shall be determined by the measurements of a certain engineer, whose determination shall be conclusive, the plaintiff may, under a *quantum meruit* count in the complaint, show his compliance with the contract; that the engineer misconstrued it and failed to make the measurements as required by it; and he may also show the amount and value of the work done, notwithstanding an allegation in the answer that an estimate of measurements was made by the engineer. *Williams v. Chicago etc. R'y Co.*, 403.
13. **CONSTRUCTION CONTRACTS QUANTUM MERUIT — LIMIT OF RECOVERY.** — In an action on a *quantum meruit* to recover for work done under a construction contract, the plaintiff cannot recover more than the contract price. *Williams v. Chicago etc. R'y Co.*, 403.
14. **CONSTRUCTION CONTRACTS — RIGHT TO RECOVER AT LAW.** — When a construction contract provides that the amount of work done thereunder shall be determined by the measurements of a certain engineer, his estimates and award may be impeached for fraud or gross mistake in an action at law as well as by suit in equity, and on a *quantum meruit* the plaintiff may recover the value of the work done. *Williams v. Chicago etc. R'y Co.*, 403.
15. **CONSTRUCTION CONTRACTS — MEASUREMENTS OF ENGINEER, WHEN CONCLUSIVE AND BINDING.** — A stipulation in a construction contract with a railway company that it shall be executed under the direction of the company's engineer, by whose measurements and calculations the amount of work performed shall be determined, and whose determination shall be final and conclusive, is valid and binding although the engineer is a stockholder in the company. *Williams v. Chicago etc. R'y Co.*, 403.
16. **CONSTRUCTION CONTRACTS — CONCLUSIVENESS OF ENGINEER'S ESTIMATES — PLEADING.** — In an action to recover for work performed under a construction contract which stipulates that it shall be executed under the direction of a certain engineer, by whose measurements the amount of work performed shall be determined, and whose determination shall be conclusive, the approval of the work by the engineer must be alleged and proved. *Williams v. Chicago etc. R'y Co.*, 403.
17. **CONSTRUCTION CONTRACTS — ENGINEER'S ESTIMATES — ATTACK ON FOR FRAUD OR MISTAKE.** — In an action to recover for work done under a construction contract which stipulates that the amount of work shall be determined by the measurements and certificate of a certain engineer, which shall be conclusive, such estimate and certificate may be impeached for fraud or gross mistake implying bad faith; otherwise they are conclusive, and so is his classification of material removed when this is left by the contract to his judgment, and no fraud is shown. *Williams v. Chicago etc. R'y Co.*, 403.
18. **CONSTRUCTION CONTRACTS — ENGINEER'S ESTIMATES — IMPEACHMENT OF FOR FRAUD — INSUFFICIENCY OF PLEADING.** — In an action to recover for work performed under a construction contract which provides that the amount of work done shall be determined by the measurements of a

certain engineer, an allegation that the latter fraudulently failed to make or certify measurements as required by the contract, is insufficient to warrant the reception of evidence to impeach any measurement made by him, as it does not give any information as to the nature of the fraudulent acts relied upon, and the latter must be alleged as well as proved. *Williams v. Chicago etc. R'y Co.*, 403.

See ACTIONS, 2, 4-7; AGENCY, 6; APPEAL, 5; ASSOCIATIONS, 3; CORPORATIONS, 7, 21; DAMAGES, 2; DEFINITIONS; EVIDENCE, 2; HUSBAND AND WIFE, 7, 8; INFANTS, 1, 2, 4; INSURANCE, 2; LIMITATIONS OF ACTIONS, 2; MANDAMUS, 3; RAILROADS, 1, 5; SALES; SPECIFIC PERFORMANCE; VENDOR AND PURCHASER, 2; WAGERS.

CONTRIBUTORY NEGLIGENCE

See MUNICIPAL CORPORATIONS, 10; NEGLIGENCE, 6; RAILROADS, 23.

CONVERSION.

See CARRIERS, 1-3; TROVER; WILLS, 10-12.

CONVEYANCES.

See DEEDS; FRAUDULENT CONVEYANCES; MORTGAGES.

CORAM NOBIS.

See ATTORNEY AND CLIENT, 2; ERROR.

CORPORATIONS.

1. **RIGHT TO VOTE STOCK.** — In the absence of statute or agreement, the right to vote stock as between the corporation and the person endeavoring to vote it follows the legal title of which the certificates and the stock book are *prima facie* evidence. *Commonwealth v. Dakell*, 640.
2. **PLEDGE OF STOCK AS COLLATERAL — RIGHT TO VOTE.** — When corporate stock is pledged as collateral security, the question whether the debtor or creditor shall vote it, depends upon the terms on which the pledge is made, and in the absence of agreement between the parties the right to vote follows the legal title. *Commonwealth v. Dakell*, 640.
3. **RIGHT OF PLEDGEE TO VOTE STOCK.** — A statute which provides that upon the objection of a stockholder to the vote of stock at a corporation election, the judges thereof "shall inquire and determine summarily whether the name on the books is that of the absolute and *bona fide* owner thereof or of a holder of the same, as executor, administrator, guardian, or as trustee created by last will, or by decree of court, and if not the vote so tendered shall be rejected," does not include a pledge of stock with no express agreement as to voting power, and if the pledgee is otherwise entitled to vote it he may do so notwithstanding such statute. The enumeration of owners and trustees in such statute is not meant to be exhaustive and exclusive, nor a mandatory direction to reject all other votes. *Commonwealth v. Dakell*, 640.
4. **RIGHT OF PLEDGEE TO VOTE STOCK.** — When the by-laws of a corporation provide that all persons holding shares "either in their own right, or as trustees," shall have a right to vote, a person who is admitted to hold stock as pledgee, and who appears from the corporate books to hold it as trustee, is entitled to vote it, in the absence of an agreement, showing a reservation of that right to the pledgor. *Commonwealth v. Dakell*, 640.

5. **HOW FAR REGARDED AS MERE LEGAL ENTITIES DISTINCT FROM THE STOCKHOLDERS.** — The doctrine that a corporation is a legal entity existing, separate and apart from the natural persons composing it is a mere fiction, introduced for purposes of convenience and to subserve the ends of justice. Hence, where that fiction is urged to an end subversive of its policy, or such is the result of giving effect to it, it must be ignored, and an averment that a certain act has been done by the stockholders, simply as individuals, and to promote their individual interests, cannot preclude judicial inquiry as to whether the act in question was really done by them in the capacity and for the purposes alleged, or was, as a matter of fact, done to control the corporation, and affect the transaction of the corporate business, in the same manner as if the act had been clothed with all the formalities of a corporate act. *State v. Standard Oil Co.*, 541.
6. **ULTRA VIRES, PENALTIES OF, WHEN INCURRED THROUGH ACTS OF INDIVIDUAL STOCKHOLDERS.** — Where all, or a majority, of the stockholders comprising a corporation, do an act which is designed to affect the property and business of the company, and which through the control their numbers give them over the selection and control of the corporate agencies, does affect the property and business of the company, in the same manner as if it had been a formal resolution of the board of directors; and the act so done is *ultra vires* of the corporation and against public policy, and was done by them in their individual capacity for the purpose of concealing their real purpose and object; the act should be regarded as the act of the corporation, and to prevent the abuse of corporate power, may be challenged as such by the state in a proceeding in *quo warranto*. *State v. Standard Oil Co.*, 541.
7. **ACTS DONE IN EXCESS OF THE POWER CONFERRED BY A CHARTER** are void in the sense that they can have no effect to divest the corporation of any right in or to any property belonging to it. All persons attempting to contract with the corporation must take notice of the powers conferred upon it by its charter. *Franco-Texan Land Co. v. McCormick*, 815.
8. **NOTICE.** — ONE IS NOT A PURCHASER IN GOOD FAITH FROM OR UNDER A CORPORATION when the deed under which he claims title purports to be made in consideration of the exchange of real for personal property, and the charter of the corporation does not authorize its lands to be conveyed for such a consideration. *Franco-Texan Land Co. v. McCormick*, 815.
9. **A CORPORATION CANNOT EMPOWER AN AGENT TO DO AN ACT WHICH MAY NOT BE LAWFULLY DONE UNDER ITS CHARTER.** *Franco-Texan Land Co. v. McCormick*, 815.
10. **PRINCIPAL AND AGENT, PRESUMPTION AS TO EXTRAORDINARY FACTS.** If an act performed by an agent of a corporation is in excess of the corporation's charter or the agent's authority, except in extraordinary circumstances, the existence of those circumstances will not be presumed as against the corporation, but must be proved by one claiming them to have existed. *Franco-Texan Land Co. v. McCormick*, 815.
11. **NOTICE TO A DIRECTOR** is not notice to a corporation, nor is he one of its executive officers to whom the details of its business are committed. *Bard v. Penn etc. Ins. Co.*, 704.
12. **CORPORATION CANNOT BE PRECLUDED FROM RECOVERING LAND CONVEYED BY ITS PRESIDENT WITHOUT AUTHORITY** because the consideration, or some part of it, was paid to him, in the absence of evidence that any part of the money received by him was paid over to the corporation or

applied to some corporate purpose. *Franco-Texas Land Co. v. McCormick*, 815.

12. A CONVEYANCE PURPORTING TO BE MADE BY A LAND CORPORATION BY ITS PRESIDENT of its lands in exchange for personal property is void, and the taking of the note of a third person in payment for such land is exchanging it for personal property. *Franco-Texas Land Co. v. McCormick*, 815.
14. AUTHORITY OF OFFICER TO BIND. — The officers of a corporation, from the highest to the lowest, are only its agents, and their acts and contracts made for their principal are binding upon it only when within the scope of their authority, express or implied. *Rumbough v. Southern Imp. Co.*, 528.
15. EVIDENCE OF POWER OF OFFICER TO BIND. — The scope of the authority of an officer, or agent of a corporation, as to a past transaction, cannot be proved by the unsworn declarations of another officer or agent. *Rumbough v. Southern Imp. Co.*, 528.
16. EVIDENCE — DECLARATIONS OF ONE OFFICER AS TO AUTHORITY OF ANOTHER. — In an action on a draft, drawn by one officer of a corporation and accepted by him in the name of the corporation, the declarations of another officer thereof, made after such acceptance, are inadmissible in evidence to show the former officer's authority to bind the corporation. *Rumbough v. Southern Imp. Co.*, 528.
17. A CORPORATION DOES NOT CHANGE ITS DOMICILE OR PLACE OF RESIDENCE by constituting an agent in another state upon whom proceedings may be served in compliance with the laws of such other state, and to enable the corporation to do business there. *Douglass v. Phenix Ins. Co.*, 448.
18. GARNISHMENT OF A CORPORATION IN ANOTHER STATE. — A domestic corporation at all times has its exclusive residence and domicile in the jurisdiction of origin, and it cannot be garnished in another jurisdiction for debts owing to it by home creditors, so as to make the attachment effectual against its creditor, in the absence of jurisdiction acquired over his person. *Douglass v. Phenix Ins. Co.*, 448.
19. JURISDICTION — FOREIGN CORPORATIONS. — Whether a corporation can be sued in a state of which it is not a resident depends upon the position in which it has seen fit to place itself in reference to that state in connection with the laws thereof. *Reyer v. Odd Fellows' etc. Ass'n*, 288.
20. JURISDICTION — CORPORATIONS OF OTHER STATES. — The courts of this state will not entertain jurisdiction of a suit against a corporation organized under the laws of another state if the adjudication which might be made in this state would depend for its enforcement upon the courts of the other state and they may say the courts of this state had mistaken the law of the other state. *Kimball v. St. Louis etc. R'y Co.*, 250.
21. JURISDICTION — FOREIGN CORPORATIONS. — A statute providing that any person who shall receive or transmit moneys for the use of a corporation organized in another state, or who shall make or cause to be made, any contract or transact any business for or on account of such corporation, shall be deemed an agent thereof, and service of process against the corporation may be made on such agent, is valid; and a judgment against a corporation based upon the service of such process, on such agent, in an action to recover upon a contract made by him, in such state with a citizen thereof, is valid and enforceable in the state where

the corporation was organized and of which it is a resident. *Reyer v. Odd Fellows' etc. Ass'n*, 288.

- 22. CONFLICT OF LAWS — SUITS AGAINST CORPORATIONS ORGANIZED AND DOING BUSINESS IN ANOTHER STATE.** — If a suit is pending against a corporation in the court of the state under whose laws it was organized, another action for the same purpose will not be entertained in another state. Though the court of the latter state may have jurisdiction to the extent that its judgment would be valid in the state where the corporation was organized, yet the plaintiffs must necessarily be referred to the courts of the latter state to compel the corporation to respect the plaintiffs' rights in case compulsion should be necessary, and therefore, the plaintiffs ought, in the first instance, to resort to that court which alone can declare the law of the case with authority and can compel obedience to it by force. *Kimball v. St. Louis etc. R'y Co.*, 250.

See ABATEMENT, 1; AGENCY, 7; CONTEMPT; CONTRACTS, 6; INSURANCE, 14, 15; LIMITATIONS OF ACTIONS, 1; MUNICIPAL CORPORATIONS; NEGOTIABLE INSTRUMENTS, 3; QUO WARRANTO.

COSTS.

See SURETYSHIP, 7.

COUNTERCLAIM.

See COLLATERAL SECURITY, 2.

COUNTY CLERK.

See DEEDS, 6.

COURTS.

See ADMIRALTY; CORPORATIONS, 20, 22; JURISDICTION; MINORS, 4; QUO WARRANTO; RECEIVERS.

COVENANTS.

See MECHANICS' LIEN, 3, 4.

COVERTURE.

SPECIFIC PERFORMANCE, 2.

CREDIT.

See SALES, 2-4.

CREDITOR'S SUIT.

- 1. PARTIES.** — SEVERAL AND SEPARATE JUDGMENT CREDITORS may unite as plaintiffs in one bill to have alleged fraudulent conveyances executed by their common debtor set aside as in fraud of their rights. *Bonar v. Means*, 772.
- 2. RETURN OF NULLA BONA WHEN NOT NECESSARY TO SUPPORT.** — Where a lien has been obtained by attachment of the property in controversy and it appears by bill that the debtor is insolvent, and that the issuing of an execution would be of no practical utility, the obtaining of the judgment, and the issuance of an execution thereon, are not necessary prerequisites to equitable interference. *Benham v. Ham*, 851.

CRIMINAL LAW.

See **ATTAINDER; ERROR; HOMICIDE; INDICTMENT; SODOMY.**

CROPS.

See **HOMESTEAD, 2; HUSBAND AND WIFE, 1, 2, 4.**

CROSS BILL.

See **MARRIAGE AND DIVORCE, 7.**

CROSS-EXAMINATION.

See **APPEAL, 7.**

CUSTODY.

See **GUARDIAN AND WARD, 1.**

CUSTOM.

EVIDENCE TO REBUT. — When a general custom is so well settled and notorious as to raise the presumption that it was known to the buyer and seller, it cannot be rebutted by the seller's testimony that he was ignorant of its existence. *Austrian v. Springer*, 350.

DAMAGES.

1. DAMAGES IN PERSONAL ACTIONS — MEASURE OF RECOVERY. — In personal actions, damages accruing after the commencement of the suit may be recovered if they are the natural and necessary result of the act complained of, and do not themselves constitute a new cause of action. *Joseph Schlitz Brewing Co. v. Compton*, 92.

2. DAMAGES FOR BREACH OF CONTRACT. — The measure of damages for breach of a contract to sell and deliver personal property when the purchase price has not been paid, is the difference between the contract price and the market price at the time and place of the promised delivery. *Austrian v. Springer*, 350.

See **ACTIONS, 3, 4; AGENCY; APPEAL, 6; JOINT LIABILITY, 2; MALICIOUS PROSECUTION, 2; MUNICIPAL CORPORATIONS, 8; NUISANCE, 2, 5-7; SALES, 3; TELEGRAPH COMPANIES, 4, 5; TROVER, 5, 6; VENDOR AND PURCHASER, 4; WATERCOURSES, 3, 4.**

DEATH.

See **ATTAINDER; SURETYSHIP, 2.**

DEBTOR AND CREDITOR.

ASSIGNMENT FOR BENEFIT OF CREDITORS — PREFERENCES. — A creditor has a right to secure the payment of his debts, even to the extent of absorbing all the estate of his debtor, and to the exclusion of the claims of all other creditors; nor will any presumption of fraud attach by reason of the exercise of this right simply because a short time after the securing of the debt the debtor attempted to claim the benefit of the assignment law. *Benham v. Ham*, 851.

See **ABATEMENT, 1; ACTIONS, 3; ASSIGNMENT; ASSIGNMENT FOR BENEFIT OF CREDITORS; ATTACHMENT, 3, 4; COLLATERAL SECURITY; CREDITOR'S SUIT; FRAUDULENT CONVEYANCES; GRANTS; MORTGAGES, 3; PARTIES; RECEIVERS.**

DECLARATIONS.

See CORPORATIONS, 15, 16; DOMICILE, 2-4; EVIDENCE, 4; MARRIAGE AND DIVORCE, 4-6; TRUSTS, 2, 3.

DEEDS.

1. CONSTRUCTION OF, WHEN THE GRANTING CLAUSE AND THE HABENDUM ARE INCONSISTENT. — When there is a repugnancy between the granting clause and the *habendum* of a deed, and it cannot be determined from the whole instrument and attendant circumstances that the grantor intended that the *habendum* should control, the granting clause must control; but where it appears, from the whole conveyance and attendant circumstances, that the grantor intended the *habendum* to enlarge, restrict, or repugn the granting clause, the *habendum* must control for the reason that it is the last expression of the grantor's wish as to the conveyance. *Bodine v. Arthur*, 162.
2. CONSTRUCTION OF — GRANTING CLAUSE, WHEN CONTROLLED BY HABENDUM. — A deed, in which the granting clause is, "have this day given, granted, bargained, and sold to H. E. B.," and the *habendum* is, "To have and to hold until the said H. E. B., wife of the said B. W. R., and to her children by him begotten, forever," will be construed as meaning that the grantor intended the *habendum* to operate as an *addendum* or proviso to the granting clause, and to control the same to the extent of limiting the estate to be conveyed to H. E. B. to a life estate, with remainder to her children begotten by B. W. B. *Bodine v. Arthur*, 162.
3. CONDITIONS SUBSEQUENT—RECORDING STATUTES.—A condition subsequent in the form of a power of revocation reserved in a deed will not be deemed impossible of execution, on the ground that the deed provides that the revocation shall be by an instrument to be acknowledged and recorded, as in the case of a deed to land. The right of revocation is not lost merely because the grantor has thus prescribed as a part of the proceedings by which the revocation is to be carried into effect, some formality which the law does not recognize. In such a case, therefore, the provision that the revocation is to be acknowledged and recorded is not to be regarded as so far of the essence or substance of the right as to defeat it. *Ricketts v. Louisville etc. R'y Co.*, 176.
4. CONDITIONS SUBSEQUENT.—An estate which has once been vested in the grantee cannot be defeated by a condition subsequent which is either impossible, illegal, or repugnant to the estate granted. *Ricketts v. Louisville etc. R'y Co.*, 176.
5. AVOIDING FOR WANT OF MENTAL CAPACITY — UNDUE INFLUENCE. — In the absence of proof of undue influence, before an heir can set aside a deed made by his ancestor, on the ground of his mental incapacity, the heir must prove such a degree of mental weakness on the part of the grantor as amounts to imbecility and renders him incapable of understanding and protecting his own interests. The fact that such grantor is physically unable to look after his property, or that his mind is enfeebled by age or disease, is not sufficient if he still retains a full comprehension of the meaning, design, and effect of his acts at the time of the execution of the deed. *Argo v. Coffin*, 86.
6. REVOCATION CLAUSE, VALIDITY OF. — Where a deed refers to a revocation of the grant which might thereafter be acknowledged and recorded in like manner as the deed itself, the revocation when afterwards carried

into effect, should be treated as part and parcel of the deed. Hence, though the recording statutes do not provide for the acknowledgment and recording of instruments revoking a grant, the county clerk has, under such circumstances, the power to take the acknowledgment and record the revocation. *Ricketts v. Louisville etc. Ry Co.*, 176.

See ACKNOWLEDGMENT; CORPORATIONS, 8; GRANTS; MINING, 1.

DEFINITIONS.

"BOODLE" IS MONEY FRAUDULENTLY OBTAINED IN PUBLIC SERVICE; especially money given to or received by officials in bribery, or gained by exclusive contracts, appointments, or the like. *Boothner v. Detroit Free Press Co.*, 318.

C. O. D. *Hasse v. American Exp. Co.*, 328.

Domicile. *Viles v. City of Waltham*, 311.

"Eligible." *Demaree v. Scates*, 113.

"Heirs." *Dukes v. Faulk*, 745.

"Heirs at law." *Dukes v. Faulk*, 745.

"Heirs of body." *Dukes v. Faulk*, 745.

"Legal heirs." *Dukes v. Faulk*, 745.

Libel. *Collins v. Dispatch Pub. Co.*, 636.

Promissory note. *Dorsey v. Wolff*, 99.

Property. *Holmes v. Gilman*, 463.

Stoppage in transitu. *Diem v. Koblitx*, 531.

"Trade." *State v. Phipps*, 152.

"Vacant and unoccupied." *Ros v. Dwelling House Ins. Co.*, 596.

DELIVERY.

See ASSIGNMENT; CARRIERS; EXPRESS COMPANIES, 1; SALES, 1, 6, 10-14; WAGERS, 2.

DEMURRER.

See PLEADING, 1-4.

DEPOSITIONS.

See ATTORNEY AND CLIENT, 2.

DEPOT.

See MANDAMUS, 2, 4, 6; RAILROADS, 1.

DESCENT.

ESTATES — DEFINITION OF THE WORD "HEIRS." — Heirs are the persons in whom real estate vests by operation of law, on the death of the one who was last seised. Ordinarily, the statute of distributions designates who are entitled to the character of heirs, as well as the shares to be enjoyed by them. *Dukes v. Faulk*, 745.

See ATTAINDER, 1; DEVISE, 1-3.

DESCRIPTION.

See SPECIFIC PERFORMANCE, 1, 4, 5; WILLS, 4, 5.

DESERTION.

See MARRIAGE AND DIVORCE, 3.

DEVISE.

1. ESTATES — LIMITATIONS ON. — "HEIRS AT LAW," "LEGAL HEIRS," "HEIRS OF BODY," or kindred terms, used in a grant or devise betokening a grant, gift, or devise, to such as a class, to take effect at a particular time, entitle such parties to take as purchasers, and not by descent, especially if the estate is made absolute by additional words of inheritance. In such case, the distribution will be *per stirpes*, unless the grant or devise otherwise directs. *Dukes v. Faulk*, 745.
2. ESTATES — LIMITATIONS — HEIRS, WHEN TAKE PER CAPITA. — When the words "heirs of the body" occur in a grant or devise accompanied by the words "share and share alike," or kindred words, accompanied by words of inheritance, the statute of distributions determines the parties who are to take, but the method of distribution is fixed by the devise to be *per capita* and not *per stirpes*, and the estate is one of purchase, and not of descent. The persons taking must not only answer the requirements of lineal descendants of the parent stock, but must also be such as would stand at the death of the life tenant as an heir under the statute of distributions. *Dukes v. Faulk*, 745.
3. ESTATES — LIMITATIONS — HEIRS, WHEN TAKE PER CAPITA. — When a devise is made to a daughter for life, and at her death to the heirs of her body then living, share and share alike, accompanied by words of inheritance, upon the death of the life tenant distribution will be made only to the surviving heirs of her body then living, namely, her children, to the exclusion of their issue, and such of her living grand and great-grand children as have survived their ancestors, and those who take will take *per capita* in fee, and not *per stirpes*. *Dukes v. Faulk*, 745.
4. ESTATES — MODE OF DISTRIBUTION. — Whenever, by the terms of description in a grant or devise, resort must be had to the statute of distributions for the purpose of ascertaining the objects of the gift, resort must also be had to the statute to ascertain the proportions in which the donees shall take, unless the instrument making the gift indicates the intention of the donor that a different rule of distribution shall be pursued. *Dukes v. Faulk*, 745.

See WILLS.

DIRECTORS.

See CORPORATIONS, 11.

DISCRIMINATION.

See INSURANCE, 13, 14; RAILROADS, 7.

DISEASE.

See CARRIERS, 4.

DISSOLUTION.

See ATTACHMENT, 5; PARTNERSHIP, 4.

DISTRIBUTION.

See DESCENT; DEVISE.

DIVORCE.

See MARRIAGE AND DIVORCE.

DOCKETING.

See HOMESTEAD, 5, 6, 8.

DOMICILE.

1. To ACQUIRE A DOMICILE, there must be a residence in a place and an intention to make it one's home. It is sufficient that he took up his abode in the place if he did so with an intention to acquire a home there and of giving up his previous home. *Viles v. City of Waltham*, 311.

2. EVIDENCE. — DECLARATIONS of a person accompanying a change of his abiding place are competent to explain the change as part of the *res gestæ*. They are also often admissible as evidence on the broader ground that they tend to show his intention to make the change. If they indicate the state of mind of the declarant, they have a legitimate tendency to show his intention. *Viles v. City of Waltham*, 311.

3. DECLARATIONS made to the assessor of a town just before the declarant left there for another place, to the effect that he intended to change his residence to the latter place, and his consulting residents of that place soon after reaching there as to measures necessary to establish his residence and acquire citizenship, are admissible for the purpose of proving that when he changed his place of abode he intended to change his residence also. *Viles v. City of Waltham*, 311.

4. EVIDENCE TO SHOW CHANGE OF. — When one has changed his place of abode, and the question arises whether he intended to change his domicile, all his acts and conduct which fairly indicate his purpose in that particular, within a reasonable time before and after the event, may be put in evidence, together with his declarations accompanying such acts. *Viles v. City of Waltham*, 311.

See ATTACHMENT, 3, 7; CONTRACTS, 10; CORPORATIONS, 17, 19; MARRIAGE AND DIVORCE, 8, 9.

DORMANT.

See PARTNERSHIP, 4.

DRAINS.

See WATERCOURSES, 1, 2.

DRUMMERS.

See AGENCY, 3.

EASEMENTS.

1. EASEMENTS AND SERVITUDES — IMPLIED GRANT. — Where the owner of land subjects part of it to an open, visible, permanent and continuous service or easement in favor of another part, and then alienates either, the purchaser takes subject to the burden or benefit, as the case may be. *Grace etc. Church v. Dobbins*, 706.

2. PROJECTING CORNICE. — IF A VENDOR GRANTS LANDS ON WHICH IS A HOUSE, its cornice and eaves projecting over land retained by him, the grant carries by implication the right to retain the cornice and eaves in the position they were in at the time of the grant. *Grace etc. Church v. Dobbins*, 706.

EJECTMENT.**See EXECUTORS AND ADMINISTRATORS.****ELECTION.****See FACTORS, 1; GAS COMPANIES, 4; INFANTS, 4; JOINT LIABILITY, 2.****ELECTIONS.****See CORPORATIONS, 2-4.****EMANCIPATION.****See PARENT AND CHILD.****ENGINEERS.****See CONTRACTS, 11-12.****EQUITABLE CONVERSION.****See WILLS, 10-12.****EQUITY.**

- 1. STATUTE OF LIMITATIONS IN EQUITY.** — When an obligation is clear and its essential character has not been affected by lapse of time, equity will enforce a claim of long standing as readily as one of recent origin, as between the immediate parties to the transaction. *Thorndike v. Thorndike*, 90.
 - 2. STATUTE OF LIMITATIONS — EQUITABLE RELIEF AGAINST.** — Although courts of equity will ordinarily act in obedience and in analogy to the statute of limitations, yet they will also, in proper cases, interfere in actions at law to prevent the bar of the statute when it would be inequitable and unjust. *Thorndike v. Thorndike*, 90.
 - 3. EQUITABLE RELIEF AGAINST.** — The fact that the remedy at law is barred by limitation in one state as between residents thereof does not give a legal or equitable right to interpose such bar to an action between the same parties in another state against property therein and where the right of action is not so barred. *Thorndike v. Thorndike*, 90.
- See ACTIONS, 2; CONTRACTS, 14; ESTATES, 1; GUARDIAN AND WARD; INJUNCTIONS; MARRIAGE AND DIVORCE, 13; MAXIMS; PARTNERSHIP, 3; SPECIFIC PERFORMANCE; TRUSTS, 3; WILLS, 1, 4.**

ERROR.

- 1. CRIMINAL LAW — WRIT OF ERROR CORAM NOBIS, WHEN AN APPROPRIATE REMEDY.** — One who, after indictment, is constrained by the fear of mob violence to plead guilty in the district court to the charge against him, and is thereupon sentenced to imprisonment and hard labor in the penitentiary, may obtain relief in the same court from such sentence and plea by proceedings in the nature of the common-law writ of error *coram nobis*. *State v. Calhoun*, 141.
- 2. ERROR CORAM NOBIS, EVIDENCE ADMISSIBLE IN PROCEEDINGS ON.** — When a prisoner is seeking to obtain relief from his sentence by proceedings in the nature of a writ of error *coram nobis*, on the ground that he was constrained by fears of mob violence to plead guilty to the charges against him, it is not improper for the trial court to permit the accused to show threats of mob violence made both before and after the plea of

guilty was entered, as well as threats not communicated to him before his plea was entered. Such evidence is all competent as tending to show that there was a real danger of mob violence, and that the fears of the accused were well founded, and it is therefore rightly submitted to the jury. *State v. Calhoun*, 141.

3. ERROR CORAM NOBIS, GUILT OF PRISONER MAY NOT BE CONSIDERED IN. —

Where a person who has been sentenced to imprisonment on a plea of guilty, which he was compelled to make by the fear of mob violence, is seeking relief by proceedings in the nature of a writ of error coram nobis, the question of his guilt or innocence cannot be considered by the jury. A mob has no right, by any means, to shift the burden of proof from the state to the accused, or to relieve the state from proving the guilt of the accused beyond a reasonable doubt. The prisoner, in such a proceeding, has the right to be placed in the same condition as he was before he entered his plea of guilty, and to insist that the question of his guilt should be investigated under the ordinary conditions of a criminal trial, in which he can avail himself of all the rights guaranteed to accused persons by the constitution. *State v. Calhoun*, 141.

See **APPEAL**.

ESTATES.

1. REMAINDER-MAN, WHEN NOT LIABLE FOR IMPROVEMENTS MADE BY LIFE TENANT. — The value of improvements made by a life tenant while in possession of land cannot be recovered as a set-off in an equitable action by the remainder-man to enforce the payment of a debt which such life tenant owes him. The principle that he who seeks equity must do equity cannot properly be applied in such a case. *Sparks v. Ball*, 236.

2. An estate tail, being an estate of inheritance which descends to particular heirs, is essentially different from a life estate with remainder to persons answering a certain description. Hence a statute which converts an estate tail into a fee simple has no application in the latter case. *Bodine v. Arthur*, 162.

See **DEEDS**, 2; **DEVISE**, 1, 2.

ESTOPPEL.

See **GUARDIAN AND WARD**, 5, 6; **HIGHWAYS**, 1; **HUSBAND AND WIFE**, 9; **INSURANCE**, 8.

ESTOVERS.

See **WASTE**, 2.

EVIDENCE.

1. CONFLICT OF LAWS. — THE COMMON LAW OF ANOTHER STATE WILL BE PRESUMED to be the same as that of this state. *Commonwealth v. Graham*, 255.

2. CONTENTS OF LETTER. — Parol evidence of the contents of a letter, to prove a contract, is inadmissible unless the letter is produced or its loss or destruction accounted for. *Rumbough v. Southern Imp. Co.*, 528.

3. A RECITAL IN AN EXECUTOR'S SETTLEMENT that a certain sum was received from a specified person, when placed in evidence to show payment of a note, may be explained. *State v. Mason*, 390.

4. **DECLARATIONS OF A PURPOSE, INTENTION, OR FEELING** made after the beginning of a controversy to which they relate, are not generally admissible in evidence, because they are naturally so affected by interest as to be untrustworthy. *Viles v. City of Waltham*, 311.
5. **QUESTIONS** calling for the name of an association to which a witness has referred by letter, do not necessarily call for the contents of a written instrument, and are permissible. *Austrian v. Springer*, 350.
- See **AGENCY**, 1; **APPEAL**, 5, 7; **ATTORNEY AND CLIENT**, 2, 3; **CONTRACTS**, 11, 18; **CORPORATIONS**, 1, 15, 16; **CUSTOM**; **DOMICILE**, 2-4; **ERROR**, 2; **GAS COMPANIES**, 2; **HOMICIDE**, 2, 3; **INSURANCE**, 6; **LIBEL**, 7; **LIMITATIONS OF ACTIONS**, 2; **MARRIAGE AND DIVORCE**, 3-6; **MECHANIC'S LIEN**, 2; **NEGOTIABLE INSTRUMENTS**, 3; **NEW TRIAL**; **SPECIFIC PERFORMANCE**, 1, 4, 5; **TRIAL**; **WILLS**, 2, 9.

EXCHANGE.

See **CORPORATIONS**, 13; **SPECIFIC PERFORMANCE**, 6, 7.

EXECUTION.

1. **EXECUTION SALES — DUTY OF PURCHASER.** — A stranger to an action having no notice of any fraud or irregularity in the judgment under which he purchases need only inquire whether or not the court from which the execution issued had jurisdiction of the parties and of the subject-matter. *Williams v. Johnson*, 513.
2. **EXECUTION SALES — INADEQUACY OF PRICE AS GROUND FOR AVOIDING.** — Inadequacy of price at an execution sale of land cannot affect the purchaser's title when he had no notice of any fraud or irregularity in the judgment under which he purchased and to which he is a stranger. *Williams v. Johnson*, 513.

See **CREDITOR'S SUIT**, 2; **HOMESTEAD**, 2.

EXECUTORS AND ADMINISTRATORS.

ADMINISTRATION ON ESTATE OF LIVING PERSON, WHEN VALID. — A probate court has jurisdiction to appoint an administrator for a missing person's estate, if the proceedings are based upon a sufficient petition and proper notice of the hearing thereof is given by publication, and it is satisfactorily proved that such person has not been heard of for more than seven years. In such a case the missing person, if he afterwards returns, cannot maintain an action of ejectment against the grantee of one who has purchased a portion of the estate at an administration sale for which an order has been duly made. *Scott v. McNeal*, 863.

See **CORPORATIONS**, 3; **EVIDENCE**, 3; **SPECIFIC PERFORMANCE**, 2; **SURETYSHIP**, 3; **WILLS**, 13, 14.

EXEMPTIONS.

See **ATTACHMENT**, 4, 6; **HOMESTEAD**, 2.

EXPLOSION.

See **GAS COMPANIES**, 2-4.

EXPRESS COMPANIES.

1. **LIABILITY FOR GOODS SENT C. O. D.** — When goods are sent by express C. O. D. the liability of the express company as a common carrier is to

safely carry the goods to their destination, notify the consignees of their arrival, and to offer delivery upon payment of the amounts, and when such duty is fully performed its liability as a common carrier terminates. If the consignees are not ready to receive and pay for the goods, it is the further duty of the company to safely store, care for, and hold them a reasonable time to enable the consignees to pay and then notify the consignor. The liability of the express company, meanwhile, is that of a warehouseman only. *Hase v. American Express Co.*, 328.

2. **LIABILITY FOR GOODS SENT C. O. D.** — Consignors sending goods by express C. O. D. must expect the express company to retain the goods in order to give the consignees an opportunity to pay for and take them, and in the meantime to store them in its warehouse, and if the goods are destroyed while so stored, the express company cannot be held to the strict liability of a common carrier, but only as a warehouseman. *Hase v. American Express Co.*, 328.

EXPULSION.

See ASSOCIATIONS, 2, 3; RAILROADS, 13-15.

FACTORS.

1. **SALE TO THEMSELVES.** — When a factor, after making advances on the goods of his principal, buys them himself without instructions and reports the sale and a balance due to the principal without disclosing the purchaser, the principal has a right to elect to affirm or repudiate the sale until he has knowledge that his factor is the purchaser; and if he subsequently affirms such sale he is entitled to recover the amount reported by the factor to be due him. *Sims v. Miller*, 762.
2. **SALE TO THEMSELVES.** — When a factor buys the goods of his principal without direction or consent of the latter, and without disclosing the purchaser, the principal may repudiate the sale upon obtaining knowledge as to the purchaser and recover the highest market value of the goods at any time before obtaining such knowledge, although the factor may have made advances on such goods. *Sims v. Miller*, 762.
3. **SALES TO THEMSELVES — RECOVERY BY PRINCIPAL — EXPENSES ON SUBSTITUTED GOODS.** — When a factor, after making advances, himself buys the goods of his principal without direction to sell and then reports the sale and a balance due without disclosing the purchaser, the principal though at first declining to affirm the sale may afterwards affirm it and sue for and recover the balance reported to be due. The principal cannot be held to a lower market value of the goods at a time when he has given directions to sell subsequently to his disaffirmance of the first sale, nor can he be charged with insurance, storage, or interest, on other goods purchased by the factor subsequently to such disaffirmance to protect himself against the claim of his principal. *Sims v. Miller*, 762.

FEEES.

See MORTGAGES, 5; NEGOTIABLE INSTRUMENTS, 5-7.

FORECLOSURE.

See MECHANICS' LIEN, 1; MORTGAGES, 5.

FORFEITURE.

See INSURANCE, 1; LIMITATIONS OF ACTIONS, 1.

FRANCHISES.

See INSURANCE, 15; LIBEL, 2; LIMITATIONS OF ACTIONS, 1; QUO WARRANTO.

FRAUD.

See CONTRACTS, 11, 12, 14, 17, '18; CREDITOR'S SUIT, 1; DEBTOR AND CREDITOR; EXECUTIONS; FRAUDULENT CONVEYANCES; GUARDIAN AND WARD, 4; JUDGMENTS, 2; LIMITATIONS OF ACTIONS, 4-8; MARRIAGE AND DIVORCE, 2, 11; SPECIFIC PERFORMANCE, 7, 8; SURETSHIP, 4, 6; RAILROADS, 6, 7.

FRAUDULENT CONVEYANCES.

1. **QUESTION FOR JURY.** — When a sale is attacked for fraud by the creditors of the vendor, and the consideration claimed for the sale is the surrender of certain notes against the latter, the validity of such notes is for the jury to determine from all the facts and circumstances in evidence. *State v. Mason*, 390.
2. **FRAUD, WHEN QUESTION FOR JURY.** — When, in a transaction between an insolvent debtor and his creditor, an inference of fraud may be drawn from all the circumstances, the question should be submitted to the jury as to whether the transaction is fraudulent as to other creditors or not. *State v. Mason*, 390.
3. **KNOWLEDGE OF VENDEE AS AFFECTING VALIDITY OF SALE.** — A sale, though made by a vendor with fraudulent intent, will not be declared void unless the vendee had actual knowledge and notice of such intent. Knowledge of facts, which, if investigated and followed out, would lead to knowledge of the fraud, is not sufficient to invalidate the transaction. *State v. Mason*, 390.
4. **PREFERENCE TO CREDITORS — GUILTY KNOWLEDGE.** — When a preference is given by an insolvent debtor to one or more creditors who receive goods in satisfaction of *bona fide* debts, actual participation in the fraud is necessary to render the acceptance of the goods fraudulent. Simple knowledge is not sufficient. *State v. Mason*, 390.
5. **INADEQUACY OF PRICE** in the sale of property by an insolvent debtor is a badge of fraud, but is not sufficient alone to raise a legal inference of fraud, unless so grossly inadequate as to strike the understanding at once with the conviction that the sale never could have been made in good faith. *State v. Mason*, 390.
6. **INADEQUACY OF PRICE — QUESTION FOR JURY.** — The fact that goods transferred by an insolvent debtor may have been largely in excess of the debt due by him does not of itself make the transaction fraudulent as to other creditors; but it is "ground of inference" from which the jury may draw the conclusion that a preference was made in fraud of other creditors. *State v. Mason*, 390.
7. **PARTIES TO ACTION TO SET ASIDE.** — In an action to set aside conveyances as fraudulent as against creditors, the original grantee, through whom such conveyances passed, but who has no legal or equitable interest under them, is not a necessary party. *Bomar v. Means*, 772.
8. **JOINDER OF CAUSES OF ACTION TO SET ASIDE** different conveyances and transactions with different persons at several different transfers, made by a debtor with the design of defrauding his creditors, may be attacked by them in one action. *Bomar v. Means*, 772.

See CHATTEL MORTGAGES; CREDITOR'S SUIT, 1.

GAMING.

See BROKERS, 1; CORPORATIONS, 18; NEGOTIABLE INSTRUMENTS, 11; TRIAL, 3.

GARNISHMENT.

See ATTACHMENT, 4, 6-8.

GAS COMPANIES.

1. NEGLIGENCE — DUTY OF NATURAL GAS COMPANY. — A natural gas company must not only construct and maintain its pipes and fittings of such material and workmanship, laid in the ground with skill and care, as to provide against the escape of gas therefrom when new, but such a system of inspection must be maintained as will insure reasonable promptness in the detection of all leaks that may occur from the deterioration of the material in the pipes or from any other cause within the circumspection of men of ordinary skill in the business. *Koelsch v. Philadelphia Co.*, 653.
2. NEGLIGENCE — EVIDENCE OF — EXPLOSION OF GAS. — An escape of gas from a pipe is, in the absence of any exculpatory explanation, some evidence of negligence on the part of the gas company, and when to this is added evidence that the day after an explosion, and while the company was uncovering its main pipe in the street near the premises, gas was seen to escape from the trench; that holes or cracks were found in the pipe, one of which had the appearance of being a rust hole, from which the gas poured in dense volumes; and that the street between such leak and the premises damaged was made ground, so porous that gas could pass through it. This establishes a *prima facie* case of negligence against the company, and justifies a finding that the gas which exploded escaped from its main pipe, and that such pipe was either defective when put in place or had been in use so long that the company ought to have known that it was unsafe to use it longer. *Koelsch v. Philadelphia Co.*, 653.
3. NEGLIGENCE OF GAS COMPANY — INJURY TO GAS PIPE FROM SEWER CONSTRUCTION — DUTY OF GAS COMPANY. — When the construction of a city sewer may naturally and probably result in injury to a gas main from the settling of the ground around it, and the gas company has, or ought to have, knowledge of the construction of the sewer, it must guard against the damage likely to result therefrom, and cannot shift the responsibility upon the city or its contractor. When in such case injury results from an explosion caused by a leak of gas, it is for the jury to determine whether or not a gas company maintaining a proper system of inspection would or ought to have knowledge, from the notoriety attending the construction of the sewer, within a shorter time than elapsed between the commencement thereof and the discovery of the leak of gas. *Koelsch v. Philadelphia Co.*, 653.
4. CONCURRENT NEGLIGENCE — GAS EXPLOSION CAUSED BY STRANGER — RIGHT OF RECOVERY. — When the presence of gas in a cellar is due to the negligence of a gas company, and an explosion results from the negligent striking of a match by a stranger, the party injured may recover against either the gas company or the stranger, or against both, at his election. *Koelsch v. Philadelphia Co.*, 653.

GAS WELLS.

See MINING, 2.

GIFTS.

See DEVISE, 1, 4; TRUSTS, 2, 4.

GRAND JURY.

See HOMICIDE, 1; DEVISE, 1, 2, 4; INDEBTMENT.

GRANTS.

GRANTS MAY BE REVOKED BY VIRTUE OF A POWER EXPRESSLY RESERVED IN THE DEED.—Since the deed is notice to the grantee's creditors that the power of revocation is reserved, such a condition cannot be assailed on the ground that it is contrary to public policy in enabling the parties to the instrument to defeat the rights of such creditors. *Richards v. Louisville etc. R'y Co.*, 176.

See EASEMENTS, 2; MINING, 2-4.

GUARDIAN AND WARD.

1. **GUARDIANSHIP IN SOCAGE** exists only when an infant under fourteen years of age is seized of real estate. The right of guardianship is in such only of the infant's next of kin as cannot take by inheritance from him; and as between kin equally entitled, the one who first obtains possession of the infant has the custody of him. *Foley v. Mutual Life Ins. Co.*, 456.
2. **GUARDIAN IN SOCAGE HAS AN ESTATE IN THE LANDS OF HIS WARD** and can maintain in his own name any appropriate action to recover the rents and profits, and to recover damages for trespass and waste upon the land, and to recover possession of the land itself. *Foley v. Mutual Life Ins. Co.*, 456.
3. **GUARDIAN IN SOCAGE HAS NO POWER TO SURRENDER FOR CANCELLATION A POLICY OF LIFE INSURANCE** of which his ward is the beneficiary, and it is doubtful whether he has any authority whatever over any of the personal property of his ward. *Foley v. Mutual Life Ins. Co.*, 456.
4. **JURISDICTION TO SETTLE ACCOUNTS OF GUARDIANS.**—If a guardian has by fraud settled his accounts with his ward, and procured a decree from the surrogate court discharging him from liability, and such ward finds it necessary to resort to a court of equity to set aside such settlement and decree on account of such fraud, the court has jurisdiction not only for the purpose of setting aside the settlement and decree, but also to determine the amount due upon an honest accounting; and its judgment fixing such amount is conclusive upon the sureties of the guardian in the absence of fraud and collusion. *Douglass v. Ferris*, 435.
5. **THE FACT THAT A GUARDIAN USED SOME OF THE PROCEEDS** of an unauthorized disposition of property of his ward for the benefit of the latter does not estop the ward from recovering such property nor make him answerable for any of such proceeds when the guardian was also his father, subject to the parental duty of supporting and caring for him, and there is nothing to show that the father was not able to perform such duty or to respond in damages to the person to whom he sold such ward's property without authority. *Foley v. Mutual Life Ins. Co.*, 456.
6. **MERE ACQUIESCENCE ON THE PART OF A WARD** will not estop him from asserting his rights to the policy of life insurance surrendered by his guardian in socage without having authority so to do. *Foley v. Mutual Life Ins. Co.*, 456.

See CORPORATIONS, 3; INFANTS, 2, 4; SURETYSHIP, 3-7.

HABENDUM.

See DEEDS, 1, 2.

HEIRS.

See DEEDS, 5; DEVISE; DESCENT; ESTATES, 2; WILLS, 7-9.

HIGHWAYS.

1. **MUNICIPAL CORPORATIONS — ADVERSE POSSESSION OF STREETS — ESTOPPEL.** — Mere adverse possession of a public street or alley in a city for the statutory period cannot confer title, but when such possession is accompanied with other circumstances, which would render it inequitable that the public should assert its rights to regain possession, then, upon the principle of estoppel, a party may be protected against the assertion of such rights, in order to prevent manifest wrong and injustice. *Crocker v. Collins*, 752.
2. **MUNICIPAL CORPORATIONS — TITLE TO STREETS ARISING FROM NONUSER.** Mere nonuser of a street or alley in a city for the period of twenty years does not amount to such an abandonment as will destroy the rights of the public therein, and confer title upon a private party. *Crocker v. Collins*, 752.
3. **DUTY OF ROAD OFFICERS IS TO PROVIDE ROADS** suitable for ordinary travel, conducted in an ordinary manner, and such safeguards as may be needed to meet the risks of such travel, but they are not bound to provide against extraordinary incidents or accidents of travel. *Herr v. Lebanon*, 603.
4. **DUTY TO KEEP IN REPAIR — NEGLIGENCE — PROXIMATE AND REMOTE CAUSE.** — A highway that is in suitable condition for ordinary travel, conducted in an ordinary manner, does not become defective because some extraordinary unforeseen condition arises, in consequence of which it is momentarily too rough or too narrow to meet all exigencies of the situation. Whatever is so much out of the ordinary course as not to be naturally foreseen as a probable result of the condition of the highway, the road officers are not bound to provide against, and their neglect to make such provision can be neither a proximate nor a concurrent cause of the injury received in consequence of such extraordinary event or accident. *Herr v. Lebanon*, 603.

See NEGLIGENCE, 3.

HOMESTEAD.

1. **HOMESTEAD RIGHTS ATTACH TO A LOT WHICH HAS BEEN PURCHASED FOR A HOMESTEAD, AND WHICH THE PURCHASER INTENDS TO USE AS SUCH,** though he has not yet occupied it, and it is not fit for such occupancy until he can have a residence built thereon, if he is proceeding in good faith to secure the erection of such residence for the purpose of using it as his home. *Cameron v. Gebhard*, 832.
2. **MORTGAGE BY HUSBAND OF CROPS ON WIFE'S LAND — SEPARATE ESTATE.** — When a husband, being permitted by the wife to manage and control her land for the purpose of supporting herself and family, makes a mortgage of the crops thereon for supplies, without the joinder, authority, or knowledge of the wife, and with notice to the mortgagee of her ownership, he cannot enforce the mortgage as against the wife. *Wells v. Batts*, 506.

2. A HOMESTEAD IS NOT SUBJECT TO A JUDGMENT LIEN unless such lien existed before the homestead right was acquired. *Freiberg v. Wakem*, 808.
4. A HOMESTEAD IS NOT SUBJECT TO THE LIEN OF A JUDGMENT AGAINST ITS OWNER EXISTING BEFORE ITS ACQUISITION if, at and before such acquisition, the debtor was occupying the property as his home and he purchased it as a home for himself and his family. As the lien cannot attach until the property vests in the debtor, and as at the moment it so vested it became his homestead, there was no intervening period in which the lien could take effect. *Freiberg v. Wakem*, 808.
5. LIEN OF JUDGMENT AGAINST. — Under the North Carolina statute, a docketed judgment is a lien on all the land of the debtor in the county where it is docketed from the date of the docketing, and the creditor may immediately enforce such lien on all of the debtor's land outside of the boundaries of his homestead; but as to such homestead estate, he cannot subject it to his lien until the homestead right therein is in some manner terminated. *Vanstory v. Thornton*, 483.
6. LIEN OF JUDGMENT AGAINST. — Under the North Carolina statute, which makes a docketed judgment a lien on all the lands of the debtor in the county where it is docketed from the date of docketing, the lien of a docketed judgment has priority over the lien of a subsequent mortgage on a homestead of the debtor as soon as the homestead right has terminated or become extinguished. *Vanstory v. Thornton*, 483.
7. SALE OF—LIEN OF JUDGMENT. — The homestead right is salable or assignable, and the purchaser can hold the land to which it attaches to the exclusion of an ordinary senior judgment creditor of his assignor or vendor until such right is in some manner terminated and extinguished. *Vanstory v. Thornton*, 483.
8. JUDGMENT AND MORTGAGE LIENS AGAINST — DISTRIBUTION OF PROCEEDS OF SALE. — When a judgment debtor, after the judgment is docketed, mortgages all of his lands, including his homestead, and they are sold under the judgment, the excess above the homestead exemption will be applied in payment of the judgment lien; but the homestead right passes to the mortgagee, and the judgment debtor is not entitled to any portion of the amount of the homestead exemption until both the judgment and the mortgage are paid, and such amount will be invested under the direction of the court until the termination of the homestead right, and the interest thereon applied to the mortgage. Upon the termination of such right, the principal will be applied: 1. To any balance remaining unpaid on the judgment; and 2. To the balance, if any, due on the mortgage, the remainder, if any, to go to the judgment debtor. *Vanstory v. Thornton*, 483.
9. HOMESTEAD EXEMPTION. — THE PROCEEDS OF A VOLUNTARY SALE OF A HOMESTEAD are not exempt from execution though the sale was made with the intention of purchasing another homestead with the proceeds. *Freiberg v. Wakem*, 808.

HOMICIDE.

1. CRIMINAL LAW — GRAND JUROR'S BIAS. — An indictment for murder will not be quashed because the grand jury knew of the cause of the death, and did not fully and sufficiently describe it, when such indictment consists of two counts, the first of which charges the accused with killing the deceased by striking, beating, and kicking her with his hands and feet, and by casting and throwing her down, unto, and upon the

floor and ground, and the second of which avers that the accused made an assault upon the decedent, and by some means, instruments, and weapons, to the jurors unknown, deprived her of her life, if there is nothing to show what evidence was before the grand jury when they found such indictment. *Commonwealth v. Holmes*, 270.

2. **CRIMINAL LAW — EVIDENCE OF PREVIOUS ACTS AND THREATS.** — On the trial of an indictment against a husband for the murder of his wife, in which there is no direct evidence that he inflicted the injuries resulting in her death, it is proper to admit evidence of threats and acts of violence on his part towards her from shortly after their marriage, some nine years prior to her death, down, or nearly down, to the time of the alleged homicide. Such evidence is admissible because it tends to prove settled ill-will and malice towards the wife, and the existence of a motive on the part of the husband for the commission of the crime with which he is charged. *Commonwealth v. Holmes*, 270.

3. **CRIMINAL LAW. — ON A TRIAL FOR MURDER, EVIDENCE** that there was sand in the mouth, nostrils, and windpipe of the decedent, when her body was first seen after her death, is admissible, at least for the purpose of disclosing the condition of the body when found. *Commonwealth v. Holmes*, 270.

HUSBAND AND WIFE.

1. **HUSBAND'S MORTGAGE OF WIFE'S SEPARATE PROPERTY — AGENCY.** — Although the wife has permitted her husband to manage and control her land for several years for the purpose of supporting herself and family, and to apply the crops growing thereon to the payment of supplies, he is not thereby authorized, as her agent, to mortgage such crop, without her knowledge or consent, to one who has notice of her ownership. *Wells v. Batts*, 506.
2. **RIGHT OF HUSBAND TO MORTGAGE WIFE'S INCOME.** — The exclusive receipt by the husband of the income of the wife, even during the entire period of the coverture, does not confer any rights upon him in or to her property, nor take away his liability to account for such income for at least one year preceding a demand. Hence he has no implied power to anticipate such income by mortgaging it to one having notice of her ownership. *Wells v. Batts*, 506.
3. **SEPARATE PROPERTY OF WIFE — EVIDENCE OF HUSBAND'S RIGHTS IN.** — Evidence of a surrender by the wife to her husband of her rights in and to her separate property during the joint occupancy, must be positive and unequivocal in order to confer upon him any proprietary interest in the use of the land. *Wells v. Batts*, 506.
4. **MORTGAGE OF CROP — INTERMIXTURE — WHO MUST BEAR LOSS.** — When a husband, prior to his death, has mortgaged crops growing on his own and his wife's land, and some of such crops are intermingled and mixed after his death that they cannot be distinguished or divided, the loss, as between the wife and the mortgagee, must fall upon the wife as the party entitled to the possession and as the party through whose fault or neglect the wrongful mixture has occurred, although she would otherwise be entitled to the whole of the crop grown upon her land. *Wells v. Batts*, 506.
5. **POWER OF WIFE TO DISPOSE OF HER SEPARATE ESTATE.** — Where a married woman has reserved, in one of the clauses of an antenuptial agreement, the full control of all her estate, with power to dispose of or manage it as she thinks proper, she will be deemed to have an absolute right to

dispose of her property at any time, as she pleases, and another clause of the agreement which provides that the rents and interest accruing from the property of both spouses should be for their joint benefit, cannot be construed so as to give her merely the power to alienate her property after her husband's death. *Williamson v. Yager*, 184.

6. **MARRIED WOMEN—RIGHT TO BECOME PARTNERS.**—Married women, while incompetent to enter into partnership engagements with their husbands, are free to enter into partnership relations with third parties, and thus bind their separate properties and estates for the partnership debts. *Vail v. Winterstein*, 334.
7. **MARRIED WOMEN—ABILITY TO CONTRACT.**—The common-law disability of a *feme covert* to make a contract exists in North Carolina except in cases provided for by statute. *Armstrong v. Best*, 473.
8. **CONFLICT OF LAWS—CONTRACTS OF MARRIED WOMEN.**—When a contract is made by a *feme covert* in one state where it is valid against her, and suit thereon is brought in another state, where she has her domicile and where the contract is void because of her coverture, it will not be enforced in the courts of the latter state. *Armstrong v. Best*, 473.
9. **HUSBAND AND WIFE—WIFE, WHEN ESTOPPED FROM CLAIMING HER SHARE OF COMMUNITY PROPERTY.**—If a husband, after separating from his wife, comes to this state and conducts himself as a single man, the wife, meanwhile, making no effort and showing no desire to assert her rights as a spouse, the community relationship will be deemed to have been abrogated as to persons here who deal with the husband in good faith, and on the assumption that he is unmarried, and the wife will be estopped from asserting a claim to land which her husband has bought with money earned since the separation, and has afterwards conveyed to an innocent purchaser. *Nuhn v. Miller*, 868.
10. **ORPHANS' COURT, COLLATERAL ATTACK UPON ORDERS OF.**—An order of the orphans' court directing the sale of the real property of a married woman for the payment of her debts cannot be attacked collaterally nor by motion made after the lapse of several years to vacate such order. *Stewart v. Madden*, 713.

See **HOMESTEAD**, 2; **HOMICIDE**, 2; **MARRIAGE AND DIVORCE**; **TRUSTS**, 5; **VENDOR AND PURCHASER**, 4.

IDEM SONANS.

See **MORTGAGES**, 1.

IMPEACHMENT.

See **JUDGMENTS**, 2; **NEW TRIAL**.

IMPRISONMENT.

See **ATTAINDER**; **ERROR**; **LIMITATIONS OF ACTIONS**, 3; **MUNICIPAL CORPORATIONS**, 4.

IMPROVEMENTS.

See **ESTATES**, 1.

INCOME.

See **HUSBAND AND WIFE**, 2.

INDICTMENT.

GRAND JURY—PREVIOUS OPINION OF GRAND JUROR. — An indictment should not be held bad because one of the jurors had before the meeting of the jury made a personal investigation of the guilt of the accused and therefrom had formed an opinion that he was guilty. In the absence of a statute changing the rule of the common law upon the subject, the grand jury is an informing and accusing body rather than a judicial tribunal and may found an indictment upon the knowledge of its members, or of one or more of them. *Commonwealth v. Woodward*, 302.

See **HOMICIDE**, 1.

INDORSEMENT.

See **ASSIGNMENT**, 2; **MISTAKE**.

INFANTS.

1. **CONTRACTS WITH INFANTS—RIGHT TO AVOID IS PERSONAL PRIVILEGE OF INFANT.** — When one contracts with an infant to compensate him for services which are subsequently rendered, the former cannot avoid his obligation to pay by setting up the plea of infancy. The right to avoid the contract on that ground is the peculiar personal privilege of the infant alone. *Hicks v. Beam*, 521.
2. **JUDGMENTS FOR OR AGAINST, WHEN CONCLUSIVE.** — When suit is brought for the services of an infant in his own name by his guardian or next friend, the decree is conclusive on him as well as the party for whom he performs the labor, though he might, if no action had been instituted, have disaffirmed the contract on which it is founded, on arriving at majority. *Hicks v. Beam*, 521.
3. **JUDGMENTS FOR OR AGAINST INFANTS, WHEN BINDING.** — When an infant institutes an action in his own name, but before judgment therein, arrives at majority, the judgment is binding on both parties to the action. *Hicks v. Beam*, 521.
4. **ACTIONS BY INFANTS—DEFENSES.** — When an infant, without the intervention of a guardian or next friend, undertakes to prosecute his suit in his own name, the debtor has a right to object to his recovery because the judgment, like the contract, may be repudiated, or affirmed and enforced, at the election of the infant, if rendered before his majority. But such objection must be interposed in apt time by plea in abatement or by answer before the trial on the merits, and if not so pleaded it will be considered as waived. *Hicks v. Beam*, 521.

See **APPEAL**, 6; **GUARDIAN AND WARD**; **MASTER AND SERVANT**, 4, 8; **NEGLIGENCE**, 5; **RAILROADS**, 30.

INJUNCTION.

1. **BOYCOTTING — INJUNCTION AGAINST.** — Discharged union workmen will be restrained by injunction from gathering about their former employer's place of business, and from following to and from their work, nonunion workmen subsequently employed by him, and from gathering about the boarding house of such workmen, or in any manner interfering with them by means of threats, menaces, intimidation, ridicule, or annoyance, on account of their working for such employer. *Murlock v. Walker*, 678.

2. **CONSPIRACY — INJUNCTION AGAINST.** — An injunction will not issue to enjoin defendant from continuing a conspiracy not to employ complainants. *Worthington v. Waring*, 294.
3. **STATUTE OF LIMITATIONS — INJUNCTION AGAINST ACTION IN ANOTHER STATE.** — A court of equity in Illinois, having jurisdiction will not enjoin a citizen of that state from prosecuting an action at law in another state against the estate of a deceased citizen of the former state upon a cause of action barred by the statute of limitations in that state, but not barred by such statute in the other state. *Thorndike v. Thorndike*, 90.
See ASSOCIATIONS, 2, 3; MINING, 2.

INNUENDO.

See LIBEL, 3, 12, 13.

INSOLVENCY.

See CREDITORS' SUIT, 2; FRAUDULENT CONVEYANCE, 2, 4; SALE, 2, 4, 7, 12.

INSTRUCTIONS.

See APPEAL, 6; LIBEL, 13.

INSURANCE.

1. **FORFEITURES DO NOT READILY FIND FAVOR IN THE LAW,** and courts are reluctant to declare and enforce them if, by reasonable interpretation, it can be avoided. *Coleman v. Insurance Co.*, 565.
2. **INSURANCE CONTRACT, WHEN SEVERABLE.** — A contract of insurance of two or more kinds of property, which are specifically appraised and valued in the policy, will be deemed severable and not entire, unless there is something in the terms or nature of the particular contract, or in the circumstances of the case, or in the nature of the different subjects of insurance, from which it may be inferred that the insurer would not have been likely to have assumed the risk on one of several of them, unless induced by the advantage and profit of having a risk on all. Hence, though there may have been some conduct of the insured as to some of the property not evil in itself, but working a breach of a condition in its letter, — as, for example, an innocent and unintentional concealment regarding the title by which the insured holds his land, — the effect of that breach may be confined to the insurance upon that property, and the contract as to that held void, and as to the other subjects held valid. *Coleman v. Insurance Co.*, 565.
3. **NOTICE OF ADDITIONAL.** — If a policy of insurance contains a condition that it shall be void in the event of procuring additional insurance, unless written notice thereof be furnished the secretary, and the approval of the company indorsed upon the policy, the effect of such condition cannot be avoided by proving that after the additional insurance was obtained, a director of the insuring corporation, having knowledge of the additional insurance, annually renewed the policy by accepting premiums thereon, there being no evidence that he was a general agent, or authorized to accept notice of overinsurance, or to waive its consequences. *Bard v. Penn etc. Ins. Co.*, 704.
4. **FORMAL PROOF.** — IMMEDIATE NOTICE of a total loss given to the insurer, dispenses with further notice or technical proofs of loss. *Roe v. Dwelling House Ins. Co.*, 595.

5. **WAIVER OF PROOFS OF LOSS.** — An absolute denial of liability by an insurer for a total loss after due notice thereof, constitutes a waiver of further or technical proofs of loss. *Roe v. Dwelling House Ins. Co.*, 595.
6. **PROOF OF NOTICE OF LOSS.** — A letter signed by the insurer, addressed and received by his agent in due course of correspondence upon the subject of the policy and loss in dispute, and in reply to a letter giving notice of such loss, when followed by a visit from the person named in the letter as one who would be sent on behalf of the insurer to attend to the loss, is admissible in evidence to show notice thereof and a waiver of further proofs. *Roe v. Dwelling House Ins. Co.*, 595.
7. **TEMPORARY VACATION OF INSURED PREMISES** for four days occurring upon a change of tenants and to suit the convenience of the departing tenant, is not such a cessation of occupancy as will vitiate a policy, providing that it shall be void if the building insured shall "become vacant or unoccupied, or not in use," and provided also that the loss occurred during such vacation. *Roe v. Dwelling House Ins. Co.*, 595.
8. **VIOLATION OF CONDITIONS IN POLICY, EFFECT OF INSURER'S KNOWLEDGE OF.** — An insurance company is estopped from asserting the invalidity of its policy at the time it was issued for the violation of any of the conditions of such policy, if, at the time it was so issued, the fact of such violation was known to the company or to its duly authorized agent. *Mesterman v. Home Mut. Ins. Co.*, 877.
9. **INSURANCE COMPANY, WHEN DEEMED TO BE AGENT OF ANOTHER COMPANY — KNOWLEDGE OF AGENT IMPUTED TO INSURER.** — An insurance broker who is employed to place insurance is the agent of his employer and not of the insurer; but where a person applies to an insurance company for a gross amount of insurance, without giving instructions to place any portion of such insurance with other companies, and receives thereafter from such company policies for the entire amount of the insurance, signed by several other companies and indorsed with a statement that the company applied to is the agent of the companies issuing the policies, the company applied to must, for the purpose of defining the relative rights of the applicant and the insurers, be regarded as the agent of the latter and not of the former. In such a case, if the company dealing with the applicant fails to disclose to one of the insurers a fact material to the risk, which has been truthfully stated in the original application, the knowledge of that fact will be imputed to the insurer, and the latter cannot avoid his policy on the ground that the insured has violated its conditions. *Mesterman v. Home Mut. Ins. Co.*, 877.
10. **CONFLICT OF LAWS — PLACE OF CONTRACT.** — When an insurance company having its home office in one state issues a policy upon property situate in another state to a resident thereof, and through its authorized agent therein as provided by the policy, the contract of insurance is deemed to have been made in the state where the property is situated, and after loss thereunder, and proof of such loss, coupled with a refusal to pay, the insured or his assignee may bring an action to recover on the policy in the latter state. *Curnow v. Phoenix Ins. Co.*, 766.
11. **PLACE OF CONTRACT.** — When, by the terms of an insurance policy, it is not binding unless countersigned by an agent residing at a particular place, that place must be regarded as the place where the contract is made, and the laws and usages of such place must govern in the interpretation of the contract. *Curnow v. Phoenix Ins. Co.*, 766.

- 12. CONFLICT OF LAWS — PLACE OF PAYMENT.** — A provision in a policy of insurance that loss thereunder shall be paid sixty days after due notice and proof of loss have been received at the office of the company, in accordance with the terms of the policy, does not stipulate for payment at the "home office" of a foreign insurer, but only postpones payment until sixty days after notice and proof of loss is received at that office. *Curnow v. Phoenix Ins. Co.*, 766.
- 13. RETALIATORY STATUTES REGARDING FOREIGN INSURANCE COMPANIES, HOW CONSTRUED, AND WHEN ENFORCEABLE.** — A statute which provides that, "when by the laws of any other state or nation, any taxes, fines, penalties, license fees, deposits of money or of securities, or other obligations or prohibitions are imposed on insurance companies of Ohio doing business in such state or nation, or upon their agents therein, so long as such laws continue in force, the same obligations and prohibitions of whatever kind, shall be imposed upon all insurance companies of such other state or nation doing business within Ohio and upon their agents here," is retaliatory and penal in its character, and must be strictly construed. It is not permissible to read into an enactment of this kind words not found in its text, for the purpose of giving it a construction in conformity with its supposed policy. Therefore the mere existence of a discriminating statute in another state is not a sufficient ground for calling such an enactment into operation, unless it is shown that there is a domestic insurance company actually organized and liable to be affected by such discrimination. *State v. Insurance Co.*, 573.
- 14. INSURANCE COMPANIES — ORGANIZATION OF — WHEN COMPLETE FOR PURPOSE OF ENFORCING RETALIATORY STATUTES.** — A statute imposing upon foreign insurance companies doing business in Ohio the same obligations and prohibitions which the states or nations to which such corporations belong have imposed upon the insurance companies of Ohio, cannot be put into operation, unless the complete and regular organization of a domestic company is proved. Articles of incorporation do not make a company, and the mere filing and recording of such articles, without the subscription of any stock or election of directors, is not such an organization as will enable the state to proceed in *quo warranto*, under the provisions of the above-mentioned statute, against a foreign insurance company. *State v. Insurance Co.*, 573.
- 15. OFFICERS — MINISTERIAL AND JUDICIAL ACTS.** — The act of the superintendent of insurance in issuing a license to a foreign insurance company for the transaction of business is ministerial, not judicial, and such a license, although it will protect the company in the transaction of business during its continuance, is not a bar to a proceeding in *quo warranto* when the company is found to be exercising any of the franchises of the state, without authority of law. *State v. Insurance Co.*, 573.
- 16. FOREIGN INSURANCE COMPANIES, POWER OF STATE TO PUNISH AGENTS OF.** The agents of foreign insurance companies who are carrying on business within the state may be convicted of violating an "act to declare unlawful trusts and combinations in restraint of trade and products, and to provide penalties therefor." The word "trade," as used in that statute, does not mean interstate commerce; and it may therefore be made to cover the transactions of such agents without placing its provisions in conflict with the powers of Congress to regulate commerce among the several states. *State v. Phipps*, 152.

- 17. STATES, POWER OF, TO REGULATE FOREIGN INSURANCE COMPANIES.**— The state has power to regulate and control the business of a foreign insurance company within its boundaries, and to provide penalties for the transgression of the regulating and controlling statutes by means of which that power is exercised. *State v. Phipps*, 152.
- 18. LIFE — AN INTEREST, TO BE INSURABLE,** must be an interest in favor of the continuance of the life, and not an interest in its loss or destruction. *Holmes v. Gilman*, 463.
- 19. LIFE. — AN INSURABLE INTEREST IN THE LIFE OF ANOTHER IS NOT PROPERTY.** *Holmes v. Gilman*, 463.
- See** COMMERCE; FACTORS, 3; GUARDIAN AND WARD, 3, 6; PARTNERSHIP, 2.

INTEREST.

See FACTORS, 3; NEGOTIABLE INSTRUMENTS, 5, 6, 8, 9.

INTERSTATE COMMERCE.

PEDDLERS' LICENSES — CONSTITUTIONAL LAW.— The clause in the constitution of the United States which gives Congress the power to regulate commerce between the several states does not render unconstitutional a law which makes a person who brings goods, wares, and merchandise from one state into another, for the purpose of peddling them in the latter, liable to pay a peddler's license in the state where they are sold, and subject equally with the citizens of that state to the specified pains and penalties for refusing to pay such license. *Rash v. Farley*, 233.

See COMMERCE, 1; INSURANCE, 16.

INTERVENTION.

See ATTACHMENT, 2.

INTOXICATING LIQUORS.

See CARRIERS, 4.

INTOXICATION.

See RAILROADS, 14, 15.

IRRIGATION.

See WATERCOURSES, 2.

JOINDER.

See FRAUDULENT CONVEYANCES, 8; MANDAMUS, 6.

JOINT LIABILITY.

- 1. TORTS — JOINT AND SEVERAL LIABILITY.** — When several persons are jointly bound to perform a duty, they are jointly and severally liable for omitting to perform it, or for performing it negligently. *Wisconsin R. R. Co. v. Ross*, 49.
- 2. TORTS — JOINT AND SEVERAL LIABILITY.** — When one has received an actionable injury at the hands of two or more wrongdoers, all, however numerous, are jointly and severally liable to him for the full amount of damages occasioned by such injury, and the plaintiff has his election to

sue all jointly, or he may bring his separate action against each or any of them. *Wisconsin R. R. Co. v. Ross*, 49.

See RAILROADS, 18.

JUDGES.

A JUDGE IS DISQUALIFIED to try or determine an application for the probate of a will made by the rector, wardens, and vestry of a particular Episcopal church if he is a member of such vestry. *State v. Young*, 41.

See MANDAMUS, 1.

JUDGMENT NOTES.

See PARTNERSHIP, 8.

JUDGMENTS.

1. CONCLUSIVENESS OF — ATTORNEY'S AUTHORITY. — When a petition for the sale of land, filed by an attorney on behalf of a widow and heirs, results in a judgment and sale thereunder, such judgment cannot be attacked, either directly or collaterally, by such heirs on the ground that the attorney had no authority to represent them. Such authority is conclusively presumed as to purchasers under the judgment who are ignorant of the attorney's want of authority. *Williams v. Johnson*, 513.

2. A FOREIGN JUDGMENT IS CONCLUSIVE upon the merits, and can be impeached only by proving that the court rendering it did not have jurisdiction of the subject-matter of the action or of the person of the defendant, or that it was procured by fraud. *Dunstan v. Higgins*, 431.

3. A FOREIGN JUDGMENT IS SUFFICIENTLY AUTHENTICATED when the attestation certifies that the papers are true copies of the records filed in the office of the court, and legally kept in the custody of the masters thereof. It is not indispensable that the certificate state that the copy had been compared by the clerk with the original, and is a correct transcript therefrom, and of the whole of the original. *Dunstan v. Higgins*, 431.

4. FOREIGN JUDGMENTS. — THE REFUSAL OF A FOREIGN COURT TO ALLOW A COMMISSION to examine witnesses in this state does not affect the conclusive character of a judgment subsequently rendered by such court. *Dunstan v. Higgins*, 431.

See APPEAL, 1; ATTACHMENT, 8; ATTORNEY AND CLIENT, 1; CORPORATIONS, 21; CREDITOR'S SUIT; EXECUTIONS; GUARDIAN AND WARD, 4; HOMESTEAD, 3-8; INFANTS, 2-4; JURISDICTION, 1; PARTNERSHIP, 8; RECEIVERS; SURETYSHIP, 4, 5.

JURISDICTION.

1. ATTACHMENT. — The law of a state cannot make a debtor a resident of that state by so declaring, contrary to the fact and the rule of general law, so as to bind another jurisdiction by the declaration, nor can any state authorize an attachment of a credit when neither the debtor nor the creditor is within its jurisdiction; and if such laws purport to authorize such attachment, the courts of this state are not bound to recognize a judgment based upon them. *Douglas v. Phenix Ins. Co.*, 448.

2. JURISDICTION OF FOREIGN COURTS. — When a party is sued in a foreign country upon a contract made there, he is subject to the procedure of

the court in which the action is pending, and must resort to it for the purposes of his defense, if he has any, and any error committed must be reviewed and corrected in the usual way. So long as he has the benefit of such rules and regulations as have been adopted and are in use for the ordinary administration of justice among the citizens and subjects of the country, he cannot complain, and justice is not denied him. *Dunstan v. Higgins*, 431.

See ABATEMENT, 1; ADMIRALTY; ATTACHMENT, 1, 3; CORPORATIONS, 18-22; EXECUTIONS, 1; EXECUTORS AND ADMINISTRATORS; GUARDIAN AND WARD, 4; JUDGMENTS, 2; MANDAMUS, 1; MARRIAGE AND DIVORCE, 8, 9.

JURY AND JURORS.

See INDIOTMENT; TRIAL.

KINDRED.

See GUARDIAN AND WARD, 1.

KNOWLEDGE.

See FRAUDULENT CONVEYANCES, 3, 4; INSURANCE, 9; LIMITATIONS OF ACTIONS, 4-8.

LABORERS.

See MASTER AND SERVANT, 10.

LACHES.

See SURETYSHIP, 6.

LANDLORD AND TENANT.

1. NUISANCE. — A landlord is not liable for an act done by a tenant without his knowledge or consent and which was not authorized by the lease. *Lufkin v. Zane*, 262.
2. NUISANCE. — If a tenant creates a nuisance without the authority of the landlord, the latter is not liable. *Lufkin v. Zane*, 262.
3. NUISANCE. — If premises were so used as to constitute a nuisance when they are let, yet if it was reasonably practicable to use them for the purpose for which they were let without creating or continuing the nuisance, then it cannot be said that the landlord by letting them authorized the creation or continuance of the nuisance, and therefore, he is not liable if the tenant continues to so use them as to create or continue a nuisance. *Lufkin v. Zane*, 262.

See ATTACHMENT, 4; NUISANCE, 3, 4; SPECIFIC PERFORMANCE, 2; VENDOR AND PURCHASER, 3.

LATERAL SUPPORT.

See MUNICIPAL CORPORATIONS, 9.

LEASE.

See LANDLORD AND TENANT.

LEGISLATURE.

See MINING, 4.

LETTERS.

See EVIDENCE, 2, 5; INSURANCE, 6; LIMITATIONS OF ACTIONS, 2; TRUSTS, 2.

LEVY.

See ATTACHMENT, 5.

LEX LOCI CONTRACTUS.

See MARRIAGE AND DIVORCE, 1.

LIBEL.

1. **DEFINITION.** — Any publication, injurious to the social character of another and not shown to be true, or to have been justifiably made, is actionable as a false and malicious libel. In other words a malicious defamation expressed in print or writing, or by signs or pictures tending to blacken the memory of the dead, with intent to provoke the living, or to injure the reputation of one who is alive and thereby expose him to public hatred, contempt, or ridicule, or to deny to him the possession of some worthy quality as every man is *a priori* to be taken to possess is libelous. *Collins v. Dispatch Pub. Co.*, 636.
2. **"BOODLE"—MEANING OF.** — When a publication charges that a franchise has been procured by the use of "boodle," the only inference is that the persons granting the franchise were, as officials, bribed by money to make the grant. Such publication is libelous. *Boekner v. Detroit Free Press Co.*, 318.
3. **ACTIONABLE WORDS.** — A publication containing the following words is libelous and actionable *per se*: "Complaints from outside parties were sent to the department, one asking for his dismissal on account of intimacy with a well known young local elocutionist." These words do not need the aid of an innuendo. *Collins v. Dispatch Pub. Co.*, 636.
4. **CRITICISM OF CONDUCT OF PUBLIC OFFICER.** — A public officer engaged in a public service is amenable to public criticism in a newspaper without liability for libel when there is probable cause for comment, and no proof of express malice, even though the statement published is not true in all respects. *Jackson v. Pittsburgh Times*, 659.
5. **PRESUMPTION.** — INJURY TO REPUTATION may be either presumed from the nature of the words themselves, or proved by evidence of their consequences, and the presumption that words are defamatory arises much more readily in cases of libel than in cases of slander. *Collins v. Dispatch Pub. Co.*, 636.
6. **MALICE WHEN INFERRED.** — When a publication considered either by itself or in connection with extrinsic facts, is defamatory, malice is an inference of law which the jury are bound to find according to the direction of the court. *Collins v. Dispatch Pub. Co.*, 636.
7. **GOOD FAITH OF PUBLICATION—EVIDENCE.** — In an action for libel based on the publication of an exaggerated and sensational account of a military officer's conduct while drunk, evidence that the military authorities brought charges against the plaintiff for his conduct, and that the inspection roll of his company showed that he was under arrest after the date of the publication, is admissible in support of good faith in making the publication, although such charges and entry on the inspection roll were made subsequent to the main transaction. *Jackson v. Pittsburgh Times*, 659.

- 9. PRIVILEGED COMMUNICATION — MALICE — INSTRUCTIONS.** — When in an action for libel it appears that the publication complained of is an exaggerated and sensational account of a militia officer's conduct while drunk, and constitutes a libel unless justified by the occasion, an instruction that such publication is libelous, and that "the style and tone of the narrative exaggerate and magnify the alleged fault of the plaintiff, and is evidence of malice," which entitles him to a verdict, unless the publication contains a substantially fair and true account of what happened, or the defendant had reasonable and probable cause to believe the statement true, and made proper inquiry, and used care in what he said, believing it to be true, is not erroneous. *Jackson v. Pittsburgh Times*, 659.
- 10. PRIVILEGED COMMUNICATION — MALICE, WHEN QUESTION OF LAW AND WHEN OF FACT.** — It is matter of law for the court to determine whether or not the occasion of writing or publishing criminary language, which would otherwise be actionable, repels the inference of malice, constituting it a privileged communication, and if there is no intrinsic or extrinsic evidence of malice, it is the duty of the court to direct a nonsuit or verdict for the defendant. If the communication contains expressions which exceed the limits of privilege, such expressions are evidence of malice, and the case should be given to the jury. *Jackson v. Pittsburgh Times*, 659.
- 11. COMMENT OF COURT.** — In an action for libel based on an exaggerated account of a militia officer's conduct when drunk, a statement by the court in the presence of the jury that "they could not see how an officer could be more degraded than to be under the influence of liquor while on duty," is within the bounds of just judicial comment, when justified by the evidence. *Jackson v. Pittsburgh Times*, 659.
- 12. DISCRETION OF COURT — SENDING OUT LIBELOUS ARTICLE WITH JURY.** In an action for libel it is not error for the court to refuse to send out the libelous publication with the jury when it retires to deliberate, especially when it does not appear that the court was requested to do so. *Jackson v. Pittsburgh Times*, 659.
- 13. THE OFFICE OF AN INNUENDO** is to aver the meaning of the language published; but, if the common understanding of mankind takes hold of the published words and at once, without difficulty, applies a libelous meaning to them, an innuendo is not needed and if used may be treated as surplusage. *Collins v. Dispatch Pub. Co.*, 636.
- 14. INNUENDO QUESTION FOR COURT AND JURY.** — The meaning of dubious words may be averred by innuendo, and the truth of the innuendo is for the jury; but the quality of an alleged libel, as it stands upon the record, either simply, or as explained by averments and innuendoes, is purely a question of law for the court, and in civil cases it is bound to instruct as to whether or not the publication is libelous, supposing the innuendoes to be true. *Collins v. Dispatch Pub. Co.*, 636.

See DEFINITIONS; TRIAL, 1.

LICENSE.

See INSURANCE, 15; INTERSTATE COMMERCE; MASTER AND SERVANT, 2; NEGOTIABLE INSTRUMENTS, 10.

LIENS.

See ADMIRALTY; ATTACHMENT, 5; CREDITOR'S SUIT, 2; HOMESTEAD, 3-6; MECHANIC'S LIEN; PARTIES.

LIFE TENANT.

See WASTE.

LIMITATIONS OF ACTIONS.

1. **PROCEEDINGS IN QUO WARRANTO, WHEN BARRED BY.**— Under the Ohio statute regulating proceedings in *quo warranto*, an action against a corporation for the forfeiture of its charter must be brought "within five years after the act complained of was done or committed"; but the right of the state to bring an action for the purpose of ousting a corporation from "the exercise of a power or franchise under its charter" is not barred until such power or franchise has been exercised for twenty years. *State v. Standard Oil Co.*, 541.
2. **LETTER AS EVIDENCE OF INDEBTEDNESS IN WRITING.**—A letter assuming the existence of a previous contract and narrating what has been done under it, but not professing to be a statement of the whole contract in writing as previously made, nor professing to be itself the contemporaneous expression of a contract then being made, is not such evidence of an indebtedness in writing as is required to relieve the contract from the operation of the statute of limitations relating to written instruments but leaves it to be governed by such statute relating to parol contracts. *Wood v. Williams*, 79.
3. **DISABILITY OF IMPRISONMENT.**— One who, from fears of his life or of great personal injury, pleads guilty to a criminal charge, and is thereupon sentenced to imprisonment and hard labor in the penitentiary for a term of years exceeding the time prescribed by the statute of limitations for the commencement of an action or proceeding to obtain relief from the judgment against him, is under such a legal disability as will prevent the statute of limitations from running against him in respect to such action or proceeding, but is not under such a legal disability as will debar him from maintaining an action to restore him to his just rights, provided that some friend will commence and conduct the proceeding for him. Any other construction of the statute would leave a person in such a position entirely without the means of obtaining relief from the consequences of his sentence, until he had served in prison the full time for which he was sentenced, and the commencement of a proceeding would then be of no benefit to him. *State v. Calhoun*, 141.
4. **CONCEALMENT OF CAUSE OF ACTION — FRAUD OF AGENT.**— A principal who has no knowledge of the fraud of his agent is not guilty of fraudulent concealment so as to prevent the running of the statute of limitations. *Wood v. Williams*, 79.
5. **CONCEALMENT OF CAUSE OF ACTION — LIABILITY FOR AGENT'S FRAUD.**— A party cannot be guilty of fraudulent concealment of a matter of the existence of which he has no knowledge so as to bring it within the operation of the statute of limitations, and if he employs an agent for the purpose of making and securing a loan only, he is not chargeable with the agent's fraudulent conduct subsequently and beyond the scope of his agency, of which the principal had no knowledge. *Wood v. Williams*, 79.
6. **FRAUDULENT CONCEALMENT OF CAUSE OF ACTION** to take it out of the operation of the statute of limitations must be that of the party sought to be charged, and mere allegation or proof that it was the act of his

agent will not be sufficient, unless he is in some way shown to have been instrumental in or cognizant of the fraud. *Wood v. Williams*, 79.

7. **CONCEALMENT OF CAUSE OF ACTION — BURDEN OF PROOF.**— When a party relies upon fraudulent concealment of a cause of action to take it out of the operation of the statute of limitations, the burden of proof is upon him to show that the opposing party can fraudulently conceal without some affirmative fraudulent act, or that he has committed some act of negligence so gross as to be equivalent to intentional fraud. *Wood v. Williams*, 79.

8. **WANT OF KNOWLEDGE WILL NOT STOP THE RUNNING OF.**— The only exception to the general rule, that a party's want of knowledge does not prevent the running of the statute of limitations against an action that has accrued in his favor, is where there has been fraud or concealment on the part of the defendant. This exception under the Ohio statute (sec. 4982), is expressly confined to "an action for relief on the ground of fraud." *State v. Standard Oil Co.*, 541.

9. **COLLATERAL SECURITIES.**— A deposit of collaterals does not prevent or impede the running of the statute of limitations upon the debts secured thereby, but the barring of any action upon such debt through the running of the statute of limitations does not affect the right of the pledgee to hold and realize upon the collateral, nor of the pledgor to call for any surplus remaining after the principal debt has been paid. *Hartranft's Estate*, 717.

10. **RENEWAL OF DEBT BY NEW PROMISE.**— An oral promise to make a renewal of a debt, or to waive the statute of limitations by a writing to be executed in the future, will not amount to a renewal or a waiver when it appears that the instrument was prepared but its execution was postponed from time to time and finally left undone. *Hartranft's Estate*, 717.

See EQUITY; INJUNCTIONS, 3; MUNICIPAL CORPORATIONS, 8; RAILROADS, 2.

LOBBYING.

See CONTRACTS, 7-9.

MALICE.

See ACTIONS, 4, 7-9; HOMICIDE, 2; LIBEL, 4, 6, 8, 9; MALICIOUS PROSECUTION.

MALICIOUS PROSECUTION.

1. **DEBTOR AND CREDITOR.**— ACTION FOR MALICIOUS ABUSE OF CIVIL PROCESS will not lie, unless there is falsehood in the demand, want of probable cause, malice in the defendant, and an actual arrest of the person or a seizure of property. *Norcross v. Otis*, 669.
2. **ABUSE OF CIVIL PROCESS.**— A civil suit, no matter how malicious or unfounded, cannot be made the ground for an action of malicious prosecution and the recovery of damages unless there has been an actual interference with either a person or his property. *Norcross v. Otis*, 669.

MANDAMUS.

1. **MANDAMUS WILL ISSUE TO COMPEL A JUDGE TO HEAR A CAUSE** if he has erroneously refused to hear it on the ground that he is disqualified or has not jurisdiction. *State v. Young*, 41.
2. **MANDAMUS TO COMPEL A RAILWAY CORPORATION TO CONSTRUCT AND MAINTAIN A DEPOT** at a designated place in a town will not be authorized

- though such railway has agreed to construct and maintain such depot at such place. The discretion of the railroad corporation as to the place where it will locate its depots will not be controlled by mandamus. *Florida etc. R'y Co. v. State*, 30.
3. **MANDAMUS DOES NOT LIE TO COMPEL THE PERFORMANCE OF PRIVATE CONTRACTS.** *Florida etc. R'y Co. v. State*, 30.
 4. **RELATORS.** — If the object sought is the enforcement of a public right, the people are regarded as the real party and the relator need not show that he has any legal interest in the result. It is enough that he is interested as a citizen in having the laws executed and the duty in question enforced. Therefore, the citizens of a municipality may appear as relators in an application for a writ of mandate to compel a railway corporation to provide a depot in such municipality, and it is not necessary that the application be made by the attorney-general. *Florida etc. R'y Co. v. State*, 30.
 5. **PRACTICE.** — AN ALTERNATIVE WRIT OF MANDAMUS SHOULD BE QUASHED IF IT REQUIRES MORE TO BE DONE than is justified by the recitals of the writ, or if the respondent cannot, by looking at the writ alone, ascertain his duty, as where the writ commands an act to be done in conformity with the ordinances of a municipality, but does not disclose what such ordinances are. *Florida etc. R'y Co. v. State*, 30.
 6. **MISJOINDER OF PARTIES AS RELATORS.** — That the mayor, inhabitants, and town of T. are joined as relators in an application for a writ of mandamus to compel the construction of a railway depot in such town, does not constitute a fatal misjoinder of relators. The words "mayor and inhabitants" may be treated as immaterial surplusage and the town as the only relator in the proceeding. *Florida etc. R'y Co. v. State*, 30.

MANSLAUGHTER.

See HOMICIDE.

MARGINS.

See WAGERS, 2.

MARKETS.

See MUNICIPAL CORPORATIONS, 5.

MARRIAGE.

See PARENT AND CHILD.

MARRIAGE AND DIVORCE.

1. **A MARRIAGE CONTRACTED OUT OF THIS STATE** if valid where contracted, is valid here, although the parties intended to avoid our laws, unless the statutes declare such marriage void, or it is deemed contrary to the laws of nature as generally recognized in Christian countries. *Commonwealth v. Graham*, 255.
2. **PREGNANCY BEFORE MARRIAGE AS GROUND FOR ANNULING.** — Pregnancy before marriage, concealed from the husband, who has not, previous to the marriage, sustained improper relations with his wife, is a fraud which is sufficient ground for annulling the marriage, if the discovery of the fact is followed by a cessation of cohabitation and abandonment. *Harrison v. Harrison*, 364.

3. **DIVORCE — CONFIDENTIAL COMMUNICATIONS — ADULTERY.** — On the trial of an action for divorce *a vinculo*, the adultery alleged cannot be shown either by the direct testimony of the parties, nor the confession of husband or wife made to each other, nor by admissions in the pleadings. *Toole v. Toole*, 479.
4. **DIVORCE — EVIDENCE — DECLARATIONS OF PARAMOUR.** — In an action for divorce *a vinculo* on the ground of adultery by the wife, the declarations of her alleged paramour, made to or in her presence, indicating that improper familiarities have been or are about to be indulged in between them, and her reply to such declarations, are not privileged communications, and are admissible in evidence. *Toole v. Toole*, 479.
5. **DIVORCE — EVIDENCE — DECLARATION BY HUSBAND.** — In an action for divorce on the ground of adultery of the wife, a declaration made by the husband to his wife that, "I have told you before, and I tell you again, I don't want to catch Palmer (the alleged paramour) at my house any more," is admissible in evidence when coming from a witness in whose presence it was made, and who has testified to improper conduct between the wife and such alleged paramour. Such declaration is not a confidential or privileged communication between husband and wife, but is a command made in the presence of a third person. *Toole v. Toole*, 479.
6. **DIVORCE — EVIDENCE — DECLARATIONS OF WIFE.** — In an action for divorce on the ground of the adultery of the wife, the testimony of a third party as to the request of the wife to be allowed to pay the costs of a prosecution against her alleged paramour, is admissible, not as a confession of her guilt, but as a circumstance tending to show her interest in and association with him, and to corroborate other testimony as to adulterous intercourse between the parties. *Toole v. Toole*, 479.
7. **PLEADING.** — An answer in a divorce proceeding in the nature of a cross bill must be verified in order to authorize a decree for the defendant, but if it is not verified, it may be amended in the absence of collusion between the parties. *Harrison v. Harrison*, 364.
8. **A DIVORCE OBTAINED IN ANOTHER STATE** by a husband from his wife who has always lived in this state for her desertion of him, is valid if he did not become a resident of the other state for the purpose of procuring the divorce, if the cause of action is one recognized by both states and the separation of the wife from her husband was not for justifiable cause. *Loker v. Gerald*, 252.
9. **DIVORCE.** — **THE DOMICILE OF A WIFE FOLLOWS THAT OF HER HUSBAND** when her separation from him is without justifiable cause. Hence the courts of a state to which he removes in good faith, and not for the purpose of procuring a divorce, acquire jurisdiction of both parties and the power to grant him a divorce upon the service of process upon her in the mode prescribed by statute. *Loker v. Gerald*, 252.
10. **ALIMONY, ALTERATIONS OF.** — Power over the subject-matter of alimony is not exhausted by the entry of the original order and decree of divorce, but is under the statute continuing for the purpose, at any time, of making such alterations thereof as may appear to the court, in the exercise of a judicial discretion, reasonable and proper. *Cole v. Cole*, 56.
11. **ALTERATION OF ALIMONY — CONSIDERATIONS AFFECTING.** — Application for an alteration or modification of a decree of divorce as regards alimony is always addressed to the judicial discretion of the court,

- and ordinarily, in the absence of fraud in procuring the decree, the inquiry is, in all cases, whether or not sufficient cause has intervened, arising from the changed conditions of the parties since the decree, to authorize or require the court applying equitable rules and principles, to change the allowance. *Cole v. Cole*, 56.
12. **ALIMONY, ALTERATION OF.** — Application for a change in the amount of alimony after divorce must be founded upon new facts which have occurred since the decree was originally made, and in the absence of new facts, such decree is deemed to be *res adjudicata* between the parties. *Cole v. Cole*, 56.
13. **ALIMONY, POWER TO ALTER ALLOWANCE OF.** — Allowances of alimony, made in decrees for divorce, will not be altered or modified, except in cases where equity calls clearly for the interposition, but when it appears unconscionable to compel the husband, by his daily labor or otherwise, to support his divorced wife in idleness and prostitution, the court will modify or revoke its former order. *Cole v. Cole*, 56.
14. **ALIMONY, ADULTERY AS GROUND FOR MODIFICATION OF.** — Adultery of the wife after divorce, and allowance of alimony payable in installments will not, of itself, constitute ground for a reduction of such alimony when the husband has failed to pay the installments, and in the absence of proof, that they are to be paid out of his earnings, or out of property which did not come to him from the wife originally or was not the result of their joint earnings or accumulations, or that her wrongdoing may not have been the result of lack of support arising from his failure to pay such installments of alimony. *Cole v. Cole*, 56.
15. **ALIMONY — ADULTERY NOT GROUND FOR REDUCING.** — After divorce has been granted and alimony allowed, the subsequent adultery or immoral conduct of either party is not ground for an increase or decrease in the amount of such allowance. *Cole v. Cole*, 56.
16. **ALIMONY, RULE FOR DETERMINING AMOUNT OF.** — A husband owes the wife, who by his fault has been driven to seek a permanent divorce, not only reasonable support and maintenance, but also that she shall be put in no worse condition by reason of the marriage, the dissolution of which has been caused by his willful misconduct. The husband must not profit by his own wrong, and restitution must be made to the wife of the property which she brought to the husband, or a suitable sum in lieu thereof be allowed out of his estate as alimony, so far as may be done consistently with the preservation of the rights of each, and also that a fair division shall be made, taking into consideration the relative wants, circumstances, and necessities of each, of the property accumulated by their joint efforts and savings. The policy of the law is to do justice, and to give to the injured wife, not merely what necessity, but what justice demands. *Cole v. Cole*, 56.
17. **ALIMONY, CONSIDERATIONS INFLUENCING ALLOWANCE OF.** — In many cases of divorce the allowance of alimony must be made upon the basis of support and sustenance of the wife only, growing out of the duty of the husband to suitably support and maintain her, when she has brought nothing to the husband, and has contributed nothing to the accumulation of his estate, or when resort must be had to the future earnings of the husband, and like cases. In such cases, if the wife remarries and acquires other means of support, the alimony will be discontinued or reduced. *Cole v. Cole*, 56.

18. **ALIMONY, CONSIDERATIONS AFFECTING THE ALLOWANCE OF.** — When a divorced wife subsequently acquires property, so that her means increase, or the facilities of the husband to pay alimony diminish, the allowance thereof may be decreased, or if the wife's wants and necessities increase, or the ability of the husband to pay is increased, the allowance of alimony may also be augmented. *Cole v. Cole*, 56.
19. **ALIMONY — REMARRIAGE — WHEN NOT GROUND FOR REDUCING.** — When alimony, allowed the wife upon divorce, is a portion of the husband's estate allotted to the wife as a division of property, remarriage, or obtaining other means of support, will not afford grounds for a reduction of alimony. *Cole v. Cole*, 56.
20. **ALIMONY, CONSIDERATIONS AFFECTING ALLOWANCE OF.** — In decreeing divorce, the court may make such allowance to the wife in the nature of alimony, as, from the nature of the case, shall be fit, reasonable, and just, taking into consideration the circumstances of the parties. Such allowance may be made payable in installments, or in gross, within the discretion of the court. *Cole v. Cole*, 56.

MARRIED WOMEN.

See HUSBAND AND WIFE; SPECIFIC PERFORMANCE, 10, 11.

MASTER AND SERVANT.

1. **ASSUMPTION OF RISKS.** — Although an employee, when he enters the service of a master, assumes all ordinary hazards incident to such service, and also other perils of which he has knowledge, yet the master undertakes the duty toward the employee of exercising reasonable care and diligence to provide the employee with a reasonably safe place in which to work, and where the service required of the employee is of a peculiarly dangerous character, undertakes the further duty of making reasonable provision to protect him from dangers to which he is exposed while in the discharge of his duty. Hence when the petition, in an action to recover for personal injuries, alleges that the defendant company was guilty of gross negligence in the construction and maintenance of a cistern which received the waste boiling water from the boilers a sugar factory, and that the injured person who was an employee in the factory, while engaged in his duties, and without any fault or negligence of his own, and without any knowledge of the cistern, fell into the same and was scalded and burnt, and evidence has been introduced in support of these allegations, it is proper for the trial court to submit to the jury, whether the defendant company was guilty of negligence in permitting the cistern to stand uncovered near one of the doors of the factory; whether the injured person had any knowledge that the cistern was uncovered at the time the injury was received, or could by the exercise of ordinary care have known of its existence; and whether, when he fell therein, he was in the exercise of ordinary care and diligence on his part. *Parkinson Sugar Co. v. Riley*, 123.
2. **SERVANT, WHEN DEEMED TO BE IN THE LINE OF HIS EMPLOYMENT.** When an employee of a sugar company, who was working on the outside of the factory at the early hour of 4 A. M. asked and received permission from the foreman to go inside the building for the purpose of warming himself, and while attempting to enter the building, fell into an uncovered cistern containing the waste boiling water of the factory

and was burned and scalded, the jury is justified in finding that at the time of his injury, he was in the line of his duty to his employer. Such evidence would not sustain a ruling that the injured person, when he left his place of work for the purpose of entering the building, was "pursuing his own comfort and pleasure, and had, at most, only the part of a licensee to go to that portion of the premises near the cistern, and that he, as a licensee only, took the risks of accident resulting from the use of the premises in which they were." *Parkinson Sugar Co. v. Riley*, 123.

3. **NEGLIGENCE IN EMPLOYING SERVANTS.** — Although a servant is not properly qualified for the place he occupies, and his negligence and incompetency result in injury to a fellow servant, the master is not liable therefor nor chargeable with negligence in employing or retaining him in the service unless the master has knowledge, or in the exercise of reasonable diligence should know, of the incompetency of the servant to discharge the duties of the position to which he is assigned. *Reiser v. Pennsylvania Co.*, 620.
4. **MINOR AND INEXPERIENCED EMPLOYEES.** — Though a servant incurred, without necessity, an obvious danger from which he suffered injury, it cannot be said, as a matter of law, that he is not entitled to recover if there is evidence tending to show that he was only fourteen years of age, rather dull of comprehension, that while he worked in view of the dangerous machinery for three weeks, yet he had not before worked with it, and that it was no part of his duty to so work, but that he had been commanded with an oath by one in apparent authority over him to enter upon the dangerous employment, and might have been confused thereby, and no attempt was made to explain to him the dangers to which he was exposed. Under such circumstances the jury should be left to determine whether he was in the exercise of due care when injured. *Patnode v. Warren Cotton Mills*, 275.
5. **WHEN ONE PERSON LENDS HIS SERVANT TO ANOTHER** for a particular employment, such servant, for anything done in that employment, must be dealt with as a servant of the person to whom he was lent, although he remains the general servant of the person who lent him. *Hasty v. Sears*, 267.
6. **FELLOW SERVANTS.** — If a servant is lent by his master to another person, and is injured by the negligence of a servant of the latter, he is regarded as being injured by a fellow servant, and cannot recover for such injury. *Hasty v. Sears*, 267.
7. **NEGLIGENCE — INJURIES INCREASED BY THE ACT OF FELLOW SERVANTS.** — If a servant is caught in dangerous machinery under such circumstances that his master is answerable, and another servant, hearing his cry of distress, and for the purpose of relieving him, does another act in so careless a manner as to inflict further injury, the master is also responsible for that. *Patnode v. Warren Cotton Mills*, 275.
8. **IF A BOY EMPLOYED IN A MANUFACTORY** is called from his work by another employee styled a "second hand," and commanded to assist him in a dangerous employment, such boy cannot be regarded as entering upon such employment improperly, even although he would have been justified in disobeying the command of the second hand. *Patnode v. Warren Cotton Mills*, 275.
9. **VICE PRINCIPAL, DELEGATION OF AUTHORITY OF.** — If an overseer of a manufactory knowingly acquiesces in the giving of orders to workmen

by another person there employed, this is equivalent to conferring authority upon such person to give such orders, and justifies employees in obeying them when given, though he acted negligently in giving them, or did not make a wise selection of the person whom he called to do certain work, or did what neither the master nor the overseer intended. *Patnode v. Warren Cotton Mills*, 275.

10. **ENTICING SERVANT TO LEAVE SERVICE — STATUTE CONSTRUED.** — The Kentucky statute, which provides that any person who shall "willfully entice, persuade, or otherwise influence any person or persons who have contracted to labor for a fixed period of time to abandon such contract before such period of service shall have expired, without the consent of the employer, shall be fined not exceeding fifty dollars, and be liable to the party injured for such damage as he may have sustained," is intended to apply, principally, to farm laborers, and should not be construed so as to cover contracts for the performances of dramatic artists. *Bourlier v. Macauley*, 171.

See **ACTIONS**, 5; **ASSOCIATIONS**, 3; **INJUNCTIONS**, 1; **RAILROADS**, 16-20; **SURETYSHIP**, 1.

MAXIMS.

Expressio Unius est exclusio alterius. *Wilson v. Byers*, 858.
He who seeks equity must do equity. *Sparks v. Ball*, 236.

MECHANIC'S LIEN.

1. **EVIDENCE THAT THE MATERIALS FURNISHED WERE USED IN THE BUILDING** upon which a mechanic's lien is claimed must be given before the lien will attach to the building or its owner can be charged for the materials. Therefore, in an action to recover from the owner of a building the price of materials furnished to the contractor, and to foreclose a mechanic's lien, it is error to refuse to permit the defendant to prove that a portion of the materials had not been used in the construction of the building. *McGarry v. Averill*, 120.
2. **USE OF THE MATERIALS IN THE BUILDING, EVIDENCE TO SHOW.**—The law seldom requires from the material man strict proof that every article purchased has been placed in the building. In ordinary cases it is enough to show that the materials were sold to be used in the building and delivered to the contractor, and to produce some testimony that materials of that character were actually used. Where there is no evidence tending to show that materials so furnished were moved away, or that an unnecessary amount was used in the construction of the building, it will be presumed that that which was furnished was actually used. *McGarry v. Averill*, 120.
3. **IF A CONTRACTOR COVENANTS WITH AN OWNER NOT TO FILE A LIEN NOR TO PERMIT ONE TO BE FILED** by others, neither he nor any subcontractor under him is entitled to a lien. The subcontractor is charged with notice of all the terms of the contract and is bound thereby. He cannot have the benefit of the builder's contract without accepting its conditions. *Nice v. Walker*, 688.
4. **TO PREVENT A CONTRACTOR OR SUBCONTRACTOR FROM FILING A LIEN** against a builder, there must be an express covenant against liens, or a covenant resulting as the necessary implication from the language employed, and an intended covenant should so clearly appear that a mechanic or material man can understand it without con-

sulting a lawyer as to its legal effect. A covenant that the owner will not be answerable for any loss or damage that may happen or for any materials or other things used in furnishing and completing the work, does not interfere with the right of either the contractor or subcontractor to file and enforce a lien. *Nice v. Walker*, 688.

5. **CONSTRUCTION CONTRACTS — LIEN UNDER AND AMENDMENT OF.** — A contractor who has done work under a construction contract is entitled to one valid mechanic's lien for the work done, and if the first one filed is faulty and defective he may file another and perfect one within ninety days from the time the work is finished. *Williams v. Chicago etc. R'y Co.*, 403.
6. **CONSTRUCTION CONTRACT — MECHANIC'S LIEN — FILING.** — When during the progress of work under a construction contract, the party making the contract sells to another, and the latter assumes to pay its grantor's debts, the contractor need not file his lien for the work done within ninety days of the sale, but may file it within ninety days from the time the work is finished, and it will then be valid as against such grantee who takes with notice of the obligation. *Williams v. Chicago etc. R'y Co.*, 403.
7. **CONSTRUCTION CONTRACTS — VALIDITY AGAINST ASSIGNEE.** — When a contractor who has performed work under a construction contract files a perfect mechanic's lien for the work done and materials furnished, as required by the statute within ninety days from the time the work is finished, such lien is valid, not only against the party with whom the contract was made, but also against its assignee who takes with notice and who assumes to pay its grantor's debts; nor will the fact that the contractor has accepted money due on his contract from the assignee affect the validity of the lien as against the assignor. *Williams v. Chicago etc. R'y Co.*, 403.

See APPEAL, 7.

MENTAL ANGUISH.

See TELEGRAPH COMPANIES, 5.

MINING.

1. **ACCESS TO STRATA UNDERLYING COAL.** — A surface owner who has conveyed the coal under his land to a grantee has a right of access through the coal to the underlying strata, although he has not reserved such right in the deed of the coal. *Chartiers etc. Coal Co. v. Mellon*, 645.
2. **ACCESS TO STRATA UNDERLYING COAL — INJUNCTION.** — When a surface owner has conveyed the coal under his land by grant, and is sinking oil or gas wells through the coal to tap the underlying strata, an injunction to restrain the sinking of the wells will not be granted when the owner of the coal has not suffered irreparable damage, and the effect of the injunction would be to destroy the estate of the surface owner in such underlying strata. *Chartiers etc. Coal Co. v. Mellon*, 645.
3. **NATURE OF ESTATE IN COAL.** — When a surface owner has conveyed the coal under his land by grant, the grantee owns the coal, but nothing else save the right of access to it and the right to remove it; and when it is all removed, the estate therein ends, and the space it occupied reverts to the grantor by operation of law. The grant of the coal does not convey any interest in the strata underlying it. *Chartiers etc. Coal Co. v. Mellon*, 645.

4. **REGULATION OF, WHEN LEGISLATIVE QUESTION.** — When the surface owner has conveyed the coal under his land by grant, his legal right of access to the strata underlying the coal is clear; but the regulation of such right involves too many questions affecting the rights of property in and of injury to the underlying strata to be settled by the judiciary. It is a legislative rather than a judicial question. *Chartiers etc. Coal Co. v. Mellon*, 645.

MINORS.

See INFANTS.

MISREPRESENTATIONS.

See SPECIFIC PERFORMANCE, 8; SURETSHIP, 4.

MISTAKE.

- MISTAKE OF LAW, RECOVERY OF MONEYS PAID UNDER.** — One who indorses a writing, believing it to be a negotiable instrument, to a person who receives it under the same belief, and who afterwards pays the latter the amount called for by such writing, cannot recover the amount so paid on the ground that it was paid under a mistake of law, in which all the parties participated, to the effect that the writing was a negotiable instrument on which the indorser was liable, when it was not such instrument, and no enforceable liability ever existed thereon. *Alton v. First Nat. Bank*, 285.

See CONTRACTS, 14, 17; SPECIFIC PERFORMANCE, 1; WILLS, 4.

MOBS.

See ERROR, 6.

MONOPOLIES.

See CONTRACTS, 6; INSURANCE, 16.

MORTGAGES.

1. **RECORD NOTICE — IDEM SONANS.** — Since a person may be sufficiently described in a written instrument by prefixing his initials to his surname, and the names "Johnson" and "Johnston," as ordinarily pronounced by the generality of mankind, are *idem sonans*, a mortgage executed by "S. M. Johnson" is sufficient to impart notice of the execution of a mortgage by "Samuel M. Johnston." *Miltonvale etc. Bank v. Kuhnle*, 129.
2. **RIGHTS OF SUBSEQUENT MORTGAGEES.** — A subsequent mortgagee with notice of a prior mortgage is not a subsequent mortgagee in good faith. *Miltonvale etc. Bank v. Kuhnle*, 129.
3. **APPLICATION OF PAYMENTS.** — A creditor holding a mortgage on property to secure the payment of his debt, is bound to apply the proceeds of a sale of the mortgaged property to the mortgage debt without any direction to that effect from the debtor. *Montague v. Stells*, 736.
4. **APPLICATION OF PAYMENTS TO UNSECURED NOTE.** — When a mortgage does not cover the rents and profits of the land embraced in the mortgage and such rents and profits are assigned to the mortgagee, he may apply them in payment of an unsecured note held by him against the mortgagor in the absence of any direction from the latter as to the application of such payments. *Montague v. Stells*, 736.

5. ATTORNEY'S FEE ON FORECLOSURE. — When mortgage notes stipulate for the payment in the event of suit, of attorney's fees of ten per cent of the amount due at time of suit, and a bond given at the same time stipulates for the payment of such notes according to their "tenor, true intent, and meaning," while the mortgage given to secure the payment of the notes and bond covenants "to pay all attorneys' fees and commissions at the rate of ten per cent on the amount for which foreclosure may be had," the mortgagor is liable for ten per cent of the amount due when the foreclosure suit is commenced, although foreclosure is ordered for a less amount by reason of payments having been made. *Montague v. Stella*, 736.

See CHATTEL MORTGAGES; HOMESTEAD, 2, 6, 8; CARRIERS, 3; HUSBAND AND WIFE, 1, 2, 4; SPECIFIC PERFORMANCE, 10.

MUNICIPAL CORPORATIONS.

- 1. POWERS OF.** — A municipal corporation is an inferior body, and has no other powers than those which have been expressly delegated to it and their appropriate incidents. *Wilson v. Beyers*, 858.
- 2. MUNICIPAL CORPORATIONS HAVE THE RIGHT TO RESTRAIN CATTLE FROM RUNNING AT LARGE** under the provisions of an ordinance passed in conformity with a grant of legislative authority for that purpose. The passage of such an ordinance is a valid exercise of the police power, and is not violative of any constitutional prohibition. *Wilson v. Beyers*, 858.
- 3. ORDINANCES TO RESTRAIN CATTLE FROM RUNNING AT LARGE.** — Proceedings under an ordinance passed for the purpose of restraining cattle from running at large on the streets of a town are proceedings *in rem*, which attach no personal liability to the owner, and therefore constructive service of process by publication is sufficient to sustain a judgment disposing of the subject-matter. *Wilson v. Beyers*, 858.
- 4. RIGHT TO FINE AND IMPRISON.** — The right to make by-laws and ordinances gives to a city, without any express grant of power, the incidental right to enforce them by reasonable pecuniary penalties, and if authorized so to do, the city may provide by ordinance that the offender may be committed to prison for a limited period, either in the first instance or in default of the payment of such penalty. *Ulrich v. St. Louis*, 372.
- 5. LIABILITY FOR NEGLIGENT CONSTRUCTION OF MARKET HOUSE.** — A city authorized but not required by charter to erect and maintain market houses, will be held to the same degree of care, not only in the construction, but also in the plan of construction of such market houses, as a private corporation or an individual, and it will also be held liable for negligence to the same extent as such corporation or individual. *Barren v. Detroit*, 366.
- 6. LIABILITY FOR NEGLIGENCE.** — A municipal corporation must respond in damages for its negligence in the construction or repair of public works when special injury results to a private person therefrom. *Krug v. St. Mary's Borough*, 616.
- 7. LIABILITY FOR NEGLIGENCE — CONSTRUCTION OF BRIDGE.** — When a municipal corporation is guilty of negligence in so constructing a bridge that it is an obstruction to the flow of water in times of ordinary high water it must respond in damages to an owner whose land is overflowed and injured as a result of such obstruction. *Krug v. St. Mary's Borough*, 616.

8. LIABILITY FOR NEGLIGENCE — PRESCRIPTION — STATUTE OF LIMITATIONS.

When a municipal corporation has been guilty of negligence in the construction of a bridge, resulting in overflow and injury to private land, the fact that no action is brought to recover damages until twenty-two years after the construction of the bridge is no evidence of a prescriptive right to flow such land; nor does the statute of limitations affect the right of action for damages suffered within the period prescribed by it. *Krug v. St. Mary's Borough*, 616.

9. MUNICIPAL CORPORATIONS — LIABILITY FOR THE REMOVAL OF LATERAL

SUPPORT. — A municipal corporation which, in grading a street, makes an excavation so negligently as to let down a portion of the soil of an abutting lot, is liable not only for the injuries occasioned thereby to the soil itself, but also for such injuries as the buildings and other improvements upon the lot may receive, unless it appears that the subsidence was caused by their weight, and that the soil in its natural condition would have remained intact. *Parks v. Seattle*, 839.

10. NEGLIGENCE — PROXIMATE CAUSE — ACCIDENT IN HIGHWAY.

— If in the ordinary use of a street one is crowded over the edge thereof and injured by the volume of travel, the sudden shying of his horse, or by reason of an accumulation of ice upon the roadway, the negligence of the city in failing to erect and maintain a barrier on the edge of the street will justify a recovery, if the plaintiff is not guilty of contributory negligence. *Herr v. Lebanon*, 603.

11. LIABILITY FOR ABATING ALLEGED.

— **IF A MUNICIPALITY**, acting under a general power to abate and prevent nuisances, abates that as a nuisance which is not such in fact, it does so at its peril. If, on the other hand, a nuisance in fact exists, the municipality is liable only when it exercises its power of abatement in an unreasonable, careless, or negligent manner, so as to produce unnecessary damage to private rights. *Orlando v. Pragg*, 17.

12. NUISANCE — LIABILITY FOR ABATING.

— If a person keeps various animals on his premises in a city in such a manner as to create a nuisance, and, after a demand, neglects to abate such nuisance or to keep his premises in such a condition that no nuisance will exist, the municipality and its officers may take such animals from such premises, transport them beyond the city limits, and turn them loose, without incurring any liability to their owner, though from such acts such animals are wholly lost to him, he, on his part, exercising no care to prevent such loss. *Orlando v. Pragg*, 17.

13. LIABILITY FOR NEGLIGENCE OF OFFICERS.

— A municipal corporation is not answerable in damages for the negligent acts of its officers in the execution of such powers as are conferred on the city or its officers for the public good. *Ulrich v. St. Louis*, 372.

14. LIABILITY FOR NEGLIGENCE OF OFFICERS.

— A person who has been committed to a city workhouse in default of the payment of a fine imposed for the violation of an ordinance, and who is kicked by a mule which he has been ordered to harness by the workhouse superintendent, the latter knowing the mule to be vicious, cannot recover damages from the city for the injury received. *Ulrich v. St. Louis*, 372.

15. MUNICIPAL CORPORATION IS NOT LIABLE FOR TORTIOUS ACT DONE BY

ITS OFFICERS OR AGENTS UNLESS it is within the scope of the corporate powers as prescribed by its charter or by some positive enactment. If the act is wholly outside of the general or special powers of the corpo-

ration, it can in no event be liable, whether it directly commanded the performance of the act or it was done by its officers without express command; but if the act is not in this sense *ultra vires*, it may be the foundation of an action of tort against the corporation, either when done by its officers under its previous direct authority, or ratified, expressly or impliedly, by it, or when done by the officers, agents, or servants of the corporation in the execution of the corporate powers or the performance of corporate duties of a municipal nature. *Orlando v. Pragg*, 17.

16. **PLEADING — LIABILITY FOR TORTIOUS ACTS.**—A complaint averring that the defendant, a municipal corporation, by and through its mayor, city council, servants, agents, and employees, entered upon plaintiff's premises, and without just cause removed, destroyed, and deprived plaintiff of the ownership, sale, use, and benefit of certain property therein designated, states a cause of action against the municipality. It does not appear from the complaint that the acts complained of were wholly beyond the power of the municipality, so as to render them *ultra vires*, and exonerate it from liability therefor. *Orlando v. Pragg*, 17.
17. **TITLE TO STREET BY ADVERSE POSSESSION.**—A municipal corporation has no power to sell or convey its streets or alleys. Hence no title can be acquired by a private individual to a public street or alley in a city by adverse possession. *Crocker v. Collins*, 752.

See NEGLIGENCE, 3; PLEADING, 1-3; RAILROADS, 21; STATUTES.

MURDER.

See HOMICIDE.

MUTUAL BENEFIT SOCIETY.

See ASSOCIATIONS.

NAMES.

See MORTGAGES, 1; PLEADING, 2.

NAVIGATION.

See WATERCOURSES, 3, 4.

NECESSARIES.

See TRUSTS, 7.

NEGLIGENCE.

1. **PROXIMATE CAUSE — CAUSAL CONNECTION — INDEPENDENT AGENCY.**—The rule that the causal connection between the negligent act and the damage done may be broken by the interposition of an independent responsible human agency, cannot be applied to relieve one of liability for a negligent act by interposing another, also committed by himself. *Burger v. Missouri Pac. R'y Co.*, 379.
2. **CONCURRENT, PROXIMATE, AND REMOTE CAUSES.**—When two distinct causes are operating at the same time to produce a given result which might be produced by either, they are concurrent causes; but if two distinct causes are successive and unrelated in their operation, they cannot be concurrent. One of them must be the proximate and the other the remote cause, and the law will regard the proximate as the

efficient and responsible cause, disregarding the remote cause. *Herr v. Lebanon*, 603.

2. **PROXIMATE CAUSE—ACCIDENT IN HIGHWAY.**—Although a city may be negligent in failing to maintain a barrier on the edge of a street, yet when a horse drawing an omnibus in the middle thereof, which is twenty feet wide and in good condition, falls from choking or inability to draw the vehicle, and in his struggles to regain his feet plunges over the edge of the street, dragging the omnibus with him, and injuring a person therein, such person cannot recover of the city, for the reason that the absence of the barrier is only the remote cause of the accident, while the fall of the horse is the proximate or efficient cause thereof. *Herr v. Lebanon*, 603.
 4. **WHEN QUESTION FOR JURY.**—When a petition charging negligence is sufficient, and the evidence tends to prove its allegations, the question of negligence must be left to the jury for its determination. *Burger v. Missouri Pac. R'y Co.*, 379.
 5. **DEGREE OF CARE REQUIRED OF CHILD.**—A child is not negligent if he exercises that degree of care which, under like circumstances, would reasonably be expected of one of his years and capacity. Whether or not he has exercised such care in a particular case is a question for the jury. *Burger v. Missouri Pac. R'y Co.*, 379.
 6. **CONTRIBUTORY NEGLIGENCE.**—If one sued for negligence does not plead contributory negligence, he has no right to have the question of such negligence submitted to the jury. *Western U. Tel. Co. v. Wisdom*, 805.
- See **BAILMENT; COLLATERAL SECURITY; GAS COMPANIES; JOINT LIABILITY; LIMITATIONS OF ACTIONS**, 7; **MASTER AND SERVANT**, 1, 3, 6, 9; **MUNICIPAL CORPORATIONS**, 5-11, 13, 14; **NUISANCE**, 1; **RAILROADS**, 18-20, 22, 26-31; **TELEGRAPH COMPANIES**, 2.

NEGOTIABLE INSTRUMENTS.

1. **NOTE—DEFINITION.**—A promissory note is a written promise by one person to pay another person therein named or order a certain sum of money at all events and at a time specified therein, or at a time which must certainly arrive. It is none the less negotiable because it is made payable on or before a named date. *Dorsey v. Wolff*, 99.
2. **NOTES—WHAT DOES NOT CONSTITUTE.**—An instrument for a specified sum of money, and also for the payment of something else, the value of which is not ascertained, but depends upon extrinsic evidence, is not a negotiable note. *Dorsey v. Wolff*, 99.
3. **CORPORATE NOTE INDORSED BY DIRECTORS—PAROL EVIDENCE TO SHOW CAPACITY IN WHICH THEY SIGNED, WHEN ADMISSIBLE.**—The directors of a corporation who write their names upon the back of a corporate note, before its delivery, and append their official title to their signatures, may, as against the original payee or any subsequent holder who accepts the note as collateral security with full notice of all the facts and circumstances connected with its delivery, show by parol evidence that they indorsed the instrument merely as agents of the corporation and not in their individual capacity. *Kline v. Bank*, 107.
4. **THE RENEWAL OF A NOTE INDUCED BY THE FALSE REPRESENTATIONS OF THE HOLDER** will not affect the rights and liabilities of the parties. Hence, where the maker and the holder of a note which is asserted to have been given upon an illegal consideration agree that the validity thereof shall, as between themselves, be determined by the decision in

an action which the holder is then prosecuting against the maker of a similar note, and the holder subsequently induces the maker, by means of false representations as to result of that action, to execute another note in renewal of the original, the holder, when seeking to enforce the new note, will be treated as he would have been if he had sued on the original, and if the latter was void, will be precluded from recovery. *Rash v. Farley*, 233.

5. **NOTE PROVIDING FOR ATTORNEY'S FEE AND INTEREST AFTER MATURITY.**
A note otherwise negotiable, which contains a provision for the payment of a legal rate of interest after maturity, and also for the payment of a specified attorney's fee if the note is not paid at maturity and suit is brought thereon, remains negotiable notwithstanding such conditions. *Dorsey v. Wolff*, 99.
 6. **PROVISION FOR ATTORNEY'S FEE — USURY.** — When a negotiable note provides for the payment of legal interest after maturity, and also for the payment of ten per cent of the amount due as an attorney's fee, to be recovered as part of the note, in case suit is brought to collect it after maturity, the provision for the attorney's fee does not render the note usurious in the absence of proof that such fee is unreasonable in amount. *Dorsey v. Wolff*, 99.
 7. **NOTE PROVIDING FOR ATTORNEY'S FEE — RIGHTS OF ASSIGNEE.** — When a negotiable note provides that the maker is to pay a certain attorney's fee in case suit is necessary to collect the note, such fee to be collected in the suit on the note, or by a separate action, the agreement as to the attorney's fee passes to the indorsee or assignee of the note as a part thereof, and he may recover it either in a suit upon the note or in a subsequent and separate action. *Dorsey v. Wolff*, 99.
 8. **NOTE PROVIDING FOR PAYMENT AFTER MATURITY** of a certain rate of interest per annum not exceeding the legal rate is not made conditional by such provision, but remains negotiable. *Dorsey v. Wolff*, 99.
 9. **INTEREST AS AFFECTING NEGOTIABILITY.** — A note, otherwise negotiable, which provides that it shall be, "without interest thereon if paid at maturity, if not paid at maturity to bear ten per cent interest from date," is not thereby rendered uncertain as to the amount to be paid, nor deprived of its negotiability. *Hope v. Barker*, 387.
 10. **PEDDLERS' LICENSES.** — A sale, made by a peddler from another state, who has not paid a license tax as required by a law of the state in which the sale is made, is an illegal contract, and a note given for the price of the article which is the subject of such a sale is void. *Rash v. Farley*, 233.
 11. **NOTES GIVEN TO A BROKER TO COVER LOSSES INCURRED IN STOCK-GAMBLING** transactions are void. *Gaw v. Bennett*, 699.
 12. **A PROMISSORY NOTE OR BILL OF EXCHANGE MAY BE MADE PAYABLE IN THE MONEY OF ANY COUNTRY.** — It is wholly immaterial in the currency or money of what country it is payable. The fact that a note is payable in Mexican silver dollars does not destroy its negotiability nor divest it of any of the attributes of a promissory note, except that the recovery thereon must be for its value in American money. *Hogue v. Williamson*, 823.
- See ASSIGNMENT, 2; COLLATERAL SECURITY; CORPORATIONS, 13, 16; EVIDENCE, 3; FRAUDULENT CONVEYANCES, 1; MISTAKE; SALES, 2, 8.**

NEW PROMISE

See **LIMITATIONS OF ACTIONS, 10.**

NEW TRIAL.

NEWLY DISCOVERED EVIDENCE WHICH IS MERELY CUMULATIVE or tends to impeach a witness is not ground for a new trial. *Wisconsin etc. R. R. Co. v. Ross*, 49.

See **APPEAL**, 4, 5.

NEXT FRIEND.

See **APPEAL**, 6; **INFANTS**, 2, 4.

NONUSER.

See **HIGHWAYS**, 2.

NOTARIES PUBLIC.

See **ACKNOWLEDGMENT**.

NOTICE.

See **ACTIONS**, 3; **CARRIERS**, 4; **CORPORATIONS**, 7, 8, 11; **EXECUTIONS**; **EXECUTORS AND ADMINISTRATORS**; **EXPRESS COMPANIES**, 1; **FRAUDULENT CONVEYANCES**, 3; **GRANTS**; **HUSBAND AND WIFE**, 1, 2; **INSURANCE**, 3-6, 12; **MECHANIC'S LIEN**, 6, 7; **MORTGAGES**, 1, 2; **RAILROADS**, 4; **TELEGRAPH COMPANIES**, 1, 2.

NUISANCE.

1. **ESCAPING OIL.** — One who constructs a pipe line and tanks to be used in the transportation of oil from the oil regions to a railway track, is answerable to a landowner for injuries resulting from the oil percolating from such pipes through his ground and injuring his springs and lands and polluting the waters thereof, and cannot exonerate himself from liability by proving that neither he nor his agents were guilty of negligence. *Hauck v. Tidewater Pipe Line Co.*, 710.
2. **DAMAGES FROM PRIVATE STRUCTURE.** — When a private structure or other work on land is the cause of a nuisance or other tort, the law will not regard it as permanent, no matter with what intention it is built, and damages therefor can be recovered only to the date of the commencement of the action. This rule is here applied to the wrongful discharge of rain water from defendant's house upon plaintiff's land. *Joseph Schiltz Brewing Co. v. Compton*, 92.
3. **LIABILITY OF GRANTEE OF PREMISES FOR.** — A grantee of premises on which a nuisance is maintained is not liable if he merely suffers it to remain, unless he is first asked to abate it, nor then, unless he has power to abate it. *Luskin v. Zane*, 262.
4. **LIABILITY OF THE GRANTEE OF LEASED PREMISES FOR.** — He who purchases premises with a nuisance on them maintained by a tenant, is not answerable for the continuance of the nuisance when it does not appear that he had any control of the tenant or of the use of the premises made by him, and even if the landlord had power to enter and expel the tenant, he is not bound to do so for the benefit of the party injured by the nuisance. *Luskin v. Zane*, 262.
5. **RECOVERY OF DAMAGES FOR, DOES NOT AUTHORIZE CONTINUANCE OF.** A legal obligation exists to remove a nuisance, and the law will not presume the continuance of the wrong, nor a license to continue a wrong, or a transfer of title to result from a recovery of dam-

ages for prospective misconduct. A recovery of damages arising from the erection of a private nuisance will not render the act or the continuance of the nuisance legal. *Joseph Schlitz Brewing Co. v. Compton*, 92.

6. **DAMAGES WHEN INJURY IS PERMANENT.** — When permanent injury is caused by a lawful public structure, properly constructed and permanent in character, damages may be recovered in one suit for the whole injury, past and prospective. *Joseph Schlitz Brewing Co. v. Compton*, 92.

7. **MEASURE OF DAMAGES.** — In cases of nuisances, or repeated trespasses, recovery can ordinarily be had only up to the date of commencement of suit, for the reason that every continuance or repetition of the nuisance or trespass gives rise to a new cause of action, for which successive suits may be brought. *Joseph Schlitz Brewing Co. v. Compton*, 92.

See **LANDLORD AND TENANT**, 2, 3; **MUNICIPAL CORPORATIONS**, 11, 12.

OFFICIAL BONDS.

See **OFFICERS**, 2-4.

OFFICERS.

1. **QUALIFICATIONS OF — ELIGIBILITY, MEANING OF.** — Where a statute provides that "no person holding any state, county, township, or city office, or any employer, officer, or stockholder in any railroad in which the county holds stock, shall be eligible to the office of county commissioner," the word "eligible" signifies "legally qualified to hold office," and does not comprehend the two meanings, "capable of being elected," and "capable of holding office." Hence, even though a person may under the above provision be disqualified for the office of county commissioner at the time of his election, he is entitled to be inducted into the office if his disqualification is removed before the day appointed for entering upon his duties arrives. *Demaree v. Scates*, 113.

2. **OFFICIAL BONDS — RELATIONSHIP BETWEEN SURETY AND PRINCIPAL.** — The sureties on an official bond, by the act of giving their principal the possession and control of the bond, after they have affixed their signatures thereto, constitute him their agent for the purpose of delivering it to the proper authorities, and if some one has to suffer because he has exceeded his powers, as by delivering the bond without procuring the signature of a person who, it was understood, was to be one of the obligors, the loss must fall on the sureties who have thus declared by their acts that he could be relied on to carry out their intentions, unless it is shown that the obligee has notice, either actual or constructive, that the conditions under which he obtained possession of the bond have not been complied with. *King County v. Ferry*, 880.

3. **OFFICIAL BONDS — LIABILITY OF SURETIES, WHEN CEASES.** — The liability of the sureties on an official bond which is to remain in effect "while the officer acts as such," and, "until his successor is elected and qualified," ceases with the expiration of his regular term of office, as defined by the law in force at the time of his election, and does not extend to a supplementary term during which he discharges the duties of his office by virtue of a subsequent statute. *King County v. Ferry*, 880.

4. **OFFICIAL BONDS, EFFECT OF ALTERATIONS IN.** — The erasure of the name of a surety on an official bond, and the substitution of another, before its delivery, and without the knowledge or consent of the other sureties, will not avoid it, if it is otherwise regular on its face, and the alteration has been so carefully made that it cannot be detected with-

out a close examination. The liability of the obligors, under such circumstances, is legally that of the obligors on a bond which has been altered without notice to the obligees. *King County v. Ferry*, 880.

See CONTEMPT; CORPORATIONS, 11-16; DEFINITIONS; HIGHWAYS, 3, 4; INSURANCE, 15; LIBEL, 2, 4, 7, 8, 10; MUNICIPAL CORPORATIONS, 12-16; SHERIFFS.

OIL WELLS.

See MINING, 2.

OPTIONS.

See APPEAL, 5; VENDOR AND PURCHASER, 2-4.

ORDINANCES.

See MANDAMUS, 5; MUNICIPAL CORPORATIONS, 2-4; RAILROADS, 21, 23, 24; STATUTES.

ORPHAN'S COURT.

See HUSBAND AND WIFE, 10.

PARAMOURS.

See MARRIAGE AND DIVORCE, 4-6.

PARENT AND CHILD.

THE MARRIAGE OF A MINOR SON, whether with or without his father's consent, so far emancipates him that the father is no longer entitled to his wages, if necessary for the support of the son's wife. *Commonwealth v. Graham*, 255.

See APPEAL, 6; GUARDIAN AND WARD, 5.

PARTIES.

PRACTICE — PURCHASERS OF PROPERTY ON CREDIT ARE NOT NECESSARY PARTIES to an action by their creditor against a sheriff who seizes and sells such property in defiance of his right of stoppage *in transitu*. Such an action does not affect the rights of the purchasers, and the creditor, if successful, merely secures possession of the property or of its value to be held subject to his lien and to the right of the purchaser to its possession upon discharging such lien. *Harris v. Tenney*, 796.

See APPEAL, 2; CONTEMPT; CREDITOR'S SUIT, 1; FRAUDULENT CONVEYANCES, 7; MANDAMUS, 4, 6; PLEADING, 5.

PARTITION.

A PAROL PARTITION OF LANDS IS VALID. *Murrell v. Mandelbaum*, 777.

See PARTNERSHIP, 7.

PARTNERSHIP.

1. EVERY PARTNER OCCUPIES A FIDUCIARY POSITION with respect to his copartners and the funds of the firm, and will not be permitted to make a personal profit out of the use of such funds. A wronged partner is entitled to the same remedy as that existing against a trustee in favor of his *cestui que trust*. *Holmes v. Gilman*, 463.

2. IF A PARTNER ABSTRACTS THE FUNDS OF A FIRM, though such abstractions are not technically embezzlements, his copartners have the right

to follow such funds and the property in which they may have been invested to the same extent as if the partner had held the funds as trustee for his copartners. *Holmes v. Gilman*, 463.

3. **INSURANCE, PARTNERSHIP FUNDS FRAUDULENTLY INVESTED IN.** — If a partner fraudulently abstracts partnership funds, and invests them in a policy of insurance upon his own life, payable to his wife in the event of his death, the partnership is entitled to the proceeds of such policy. *Holmes v. Gilman*, 463.
4. **DORMANT PARTNER, WHEN NOT LIABLE.** — Where the ostensible partner in a firm comprising two dormant partners, just before the date at which it is agreed that the dormant partners shall retire, orders goods in his own name from a person who does not acquire any knowledge of the existence of the partnership until long after its dissolution, and expressly directs that the goods shall not be shipped until after the day fixed for such dissolution, he alone is liable for the price, unless it is shown that the retiring partners have received the benefits of the transaction. *Pittin v. Benfer*, 110.
5. **PARTNERSHIP IN LANDS.** — Whether land belonging to a firm or conveyed to a firm is to be considered as part of the partnership stock depends on the intention of the parties, to be ascertained from their acts or their agreements, express or implied. Land may be made part of the partnership stock under a parol agreement of the partners. *Murrell v. Mandelbaum*, 777.
6. **PARTNERSHIP IN LANDS.** — When real estate is part of the partnership effects, it is to be treated in equity, to all intents and purposes, as a part of the partnership funds and held subject to all the equitable rights and liens of the partners which would apply to it if it were personal estate. *Murrell v. Mandelbaum*, 777.
7. **PARTNERSHIP LANDS, PAROL CONVEYANCE BY ONE PARTNER TO THE OTHER.** If the property of a partnership consists of real and personal estate, and the partners settle their business and dissolve their partnership, agreeing that one of them shall have the real and the other the personal property, and such agreement is followed by the taking and keeping of the personal property by the partner to whom it is thus allotted, this is equivalent to a parol partition of the lands, and vests the title thereto in the partner by whom it was to be retained. *Murrell v. Mandelbaum*, 777.
8. **PARTNERSHIP.** — **JUDGMENTS ENTERED UPON SEALED JUDGMENT NOTES GIVEN IN THE NAME OF A FIRM BY ONE MEMBER THEREOF,** without authority from the other, will not be set aside at the instance of such other member, or of creditors of the firm, though such notes were given for partnership indebtedness not yet due. Because such notes were valid and existing neither the dissenting partner nor the other creditors have any equitable ground for relief. *Boyd v. Thompson*, 685.

See **HUSBAND AND WIFE**, 6; **VENDOR AND PURCHASER**, 1.

PAYMENT.

See **CORPORATIONS**, 13; **EVIDENCE**, 3; **MORTGAGES**, 3, 4; **NEGOTIABLE INSTRUMENTS**, 12; **RECEIVERS**.

PEDDLERS.

See **INTERSTATE COMMERCE**; **NEGOTIABLE INSTRUMENTS**.

PENALTIES.

See INSURANCE, 16, 17; MUNICIPAL CORPORATIONS, 5.

PENITENTIARY.

See ATTAINER, 2.

PER CAPITA.

See DEVISE, 2, 3.

PERSONAL PROPERTY.

See GUARDIAN AND WARD, 3; PARTNERSHIP, 6, 7; TRUST, 2; WILLS, 10-12.

PER STIRPES.

See DEVISE, 1-3.

PLEADING.

- 1. DEMURRER — WHEN QUESTION OF TITLE TO STREET BY ADVERSE POSSESSION CANNOT BE RAISED BY.** — When a complaint in an action against a municipal corporation contains no allegation that the land in dispute, claimed by adverse possession, has ever been in fact a public street or alley, the question whether or not title to a public street or alley can be acquired against a city cannot be raised by demurrer. *Crocker v. Collins*, 752.
- 2. INACCURACY OF NAME NOT GROUND FOR DEMURRER.** — The fact that the name of the defendant, a municipal corporation, is not accurately stated in the complaint is not ground for demurrer. *Crocker v. Collins*, 752.
- 3. SUFFICIENCY OF COMPLAINT — DEMURRER.** — When the allegations contained in a complaint against a municipal corporation are sufficient to show that the acts complained of were done by the executive officer of the town council, under authority of that body, any want of particularity or distinctness in the allegation in this respect should be remedied by motion to make the allegations more definite, but it is not a ground for demurrer. *Crocker v. Collins*, 752.
- 4. DEMURRERS ADMIT ALL FACTS PROPERLY ALLEGED,** and the sufficiency of the complaint must be decided on the facts as alleged. *Bomar v. Means*, 772.
- 5. VERIFICATION OF, WHEN NECESSARY.** — Where one section of a statute provides that a joint pleading of several parties who are united in interest may be verified by any one of them, and a subsequent section provides that, on motion of a party who files his affidavit, stating his belief that an adverse party, whose pleading has been verified by a person other than himself, knows that a statement thereof mentioned in the affidavit is untrue, the court, if such statement is material, shall require the adverse party to verify the pleading, and if he fail to do so within a reasonable time, shall treat it, with regard to him, as if it had not been filed, the latter section will be deemed to qualify the former, and the pleading of a party, whether filed by him alone or jointly with others, will be treated, in regard to him, as a nullity, if he refuses to verify it under the circumstances specified in the latter section. *Harrison v. Lebanon Waterworks*, 180.

See ACTIONS, 6, 7; APPEAL, 4; CONTRACTS, 11, 12, 16, 18; INFANTS; MARRIAGE AND DIVORCE, 3, 7; NEGLIGENCE, 6; TROVER, 1.

PLEDGE.

See **COLLATERAL SECURITY; CORPORATIONS, 2-4; LIMITATIONS OF ACTIONS, 2.**

POLICE POWER.

See **CARRIERS, 4; MUNICIPAL CORPORATIONS, 2.**

POSSESSION.

See **GUARDIAN AND WARD, 1, 2; SPECIFIC PERFORMANCE, 10; TRUSTS, 2.**

POWERS.

See **WILLS, 10-14.**

PRACTICE.

See **APPEAL; PLEADING; TRIAL.**

PRECATORY.

See **TRUSTS, 4, 5.**

PREFERENCES.

See **ASSIGNMENT FOR BENEFIT OF CREDITORS; DEBTOR AND CREDITOR; FRAUDULENT CONVEYANCES, 4, 6.**

PREGNANCY.

See **MARRIAGE AND DIVORCE, 2.**

PRESCRIPTION.

See **MUNICIPAL CORPORATIONS, 2.**

PRESUMPTIONS.

See **AGENCY, 2, 4; ATTORNEY AND CLIENT, 1; CORPORATIONS, 10; CUSTOM; DEBTOR AND CREDITOR; EVIDENCE, 1; FRAUDULENT CONVEYANCES, 6; LIBEL, 5.**

PRETERMITTED.

See **WILLS, 7-9.**

PRIVILEGE.

See **INFANTS, 1.**

PRIVILEGED COMMUNICATIONS.

See **ATTORNEY AND CLIENT, 2, 3; LIBEL, 8, 9; MARRIAGE AND DIVORCE, 4, 5.**

PROBATE COURT.

See **APPEAL, 3; EXECUTORS AND ADMINISTRATORS.**

PROCESS.

See **ABATEMENT, 1; ACTIONS, 1; CARRIERS, 2, 4; CONTEMPT; CORPORATIONS, 17, 21; MALICIOUS PROSECUTION; MARRIAGE AND DIVORCE, 9; MUNICIPAL CORPORATIONS, 3.**

PROMISSORY NOTES.

See NEGOTIABLE INSTRUMENTS.

PROOFS OF LOSS.

See INSURANCE, 4-6, 12.

PROXIMATE CAUSE.

See NEGLIGENCE, 1-3; RAILROADS, 23.

PUBLICATION.

See EXECUTORS AND ADMINISTRATORS; MUNICIPAL CORPORATIONS, 2.

PUBLIC POLICY.

See CONTRACTS, 6-9; CORPORATIONS, 6; GRANTS; RAILROADS, 1, 5.

PUBLIC WORKS.

See MUNICIPAL CORPORATIONS, 6.

QUALIFICATIONS.

See OFFICERS, 1.

QUANTUM MERUIT.

See CONTRACTS, 11-14.

QUASHING.

See HOMICIDE, 1; MANDAMUS, 2.

QUESTION FOR JURY.

See TRIAL.

QUO WARRANTO.

FOREIGN CORPORATIONS — QUO WARRANTO AGAINST. — The courts of a state in which a foreign corporation transacts business have no power to oust it of the right to be a corporation, nor of any of the franchises or privileges conferred by the laws of the state in which it was organized; but, as to the franchises or privileges which such corporation derives from the laws of the state in which it is transacting business, it is no less amenable to the jurisdiction of the domestic courts than a domestic corporation. *State v. Insurance Co.*, 573.

See CORPORATIONS, 6; INSURANCE, 14, 15; LIMITATIONS OF ACTIONS, 1.

RAILROADS.

1. **CONTRACTS FOR THE ESTABLISHING OF A RAILWAY DEPOT** exclusively in a particular place are void as against public policy. *Florida etc. R'y Co. v. State*, 30.
2. **TRUSTEES OF RAILROADS REGARDED AS AGENTS.** — Trustees who are selected by a railroad company and who control the road and operate it to earn money to be applied in payment of the debts of the company must be regarded as its agents so far as relates to the transaction of its business with third persons. *Wisconsin etc. R. R. Co. v. Ross*, 49.

3. **LIABILITY FOR TORT WHEN OPERATED BY TRUSTEES.** — A railroad company which has voluntarily placed itself and its property and franchises in the hands of trustees to secure its debt to bondholders, cannot lie by when sued for a tort which it claims to have been committed by such trustees, and shield both itself and the trustees from liability by concealing the fact that the trustees are operating the road, until the statute of limitations has barred the right of action. *Wisconsin etc. R. R. Co. v. Ross*, 49.
4. **LIABILITY FOR TORT WHEN OPERATED BY TRUSTEES.** — When a railroad is operated in the name of the company by trustees for the bondholders of the road, without notice to third persons or to employees of the company that such trustees are operating the road or that it is operated in their names as trustees, an action by an employee to recover for personal injury caused by the use of a defective track may be maintained against such trustees individually, or in the name they use in operating the road. *Wisconsin etc. R. R. Co. v. Ross*, 49.
5. **CARRIERS — DISCRIMINATION IN FAVOR OF A SHIPPER.** — A contract by which a railroad company binds itself to carry for one shipper at half the rate it agrees to charge all others for the same service, in consideration of his agreeing to establish a system of pipe lines to its road, and by which, at the same time, and for the same consideration it also engages to charge all other shippers double the amount as a fixed open rate, and to pay the favored shipper one half of such amount when collected, is contrary to public policy and void. *Brundred v. Rice*, 589.
6. **ASSUMPSIT, WHEN LIES IN FAVOR OF ONE SHIPPER AGAINST ANOTHER.** — When a railroad company in pursuance of an unlawful agreement, by which it has bound itself to charge all but one shipper a certain amount for the carriage of goods, and to pay such favored shipper one half of the amount, when collected, has charged and collected certain sums, as freight, from another shipper ignorant of the agreement, and has paid them over to the other party, the second shipper may, on discovering the fraud, maintain an action against that party for money had and received to his use. *Brundred v. Rice*, 589.
7. **FRAUD VITIATES EVERYTHING INTO WHICH IT ENTERS.** — There is nothing so sacred in a certificate of incorporation as to take it out of the reach of this principle. Therefore, the favored shippers who, in pursuance of an unlawful agreement between them and a railroad company, by which they are to be paid one half of the freight collected from other shippers, have received the money which constitutes their stipulated share of the amount collected from one of the shippers against whom the discrimination has been exercised, cannot defend themselves against an action brought by that shipper for the recovery of such money by showing that they have organized themselves into a corporation, if the evidence shows that the organization was not effected in good faith, but merely for the purpose of carrying out the illegal agreement, and shielding themselves from the consequence of receiving the money illegally exacted in accordance with its terms. *Brundred v. Rice*, 589.
8. **A TICKET LIMITING THE TIME WITHIN WHICH A PASSENGER IS ENTITLED** to ride from one point to another is subject to the implied condition that the train shall make the passage within that time, or, in other words, that the corporation shall perform its obligation. If the passenger is to be transported over connecting lines but is delayed upon one of them without his fault so that he cannot finish his

journey within the time designated, he does not lose his right to be carried to his destination, and if ejected from his train by a carrier, though not the one by whose fault his delay occurred, may recover damages therefor, provided his ticket was evidence of a joint undertaking on the part of all the lines of railway over which it was necessary for him to travel. *Gulf etc. R'y Co. v. Looney*, 787.

9. **TICKET OVER CONNECTING LINES DOES NOT EVIDENCE A JOINT CONTRACT** by them when it consists of coupons each entitling the passenger to transportation over the line of the carriers designated therein, and the whole is sold by one of them acting as the agent of the others so far as their lines are concerned. Each coupon is the separate contract of the connecting carrier to whose line it applies. *Gulf etc. R'y Co. v. Looney*, 787.

10. **IF THE TIME WITHIN WHICH A PASSENGER MAY USE A COUPON TICKET OVER CONNECTING LINES IS LIMITED** therein, and each of the coupons is the separate contract of the line to which it relates, it need not be honored unless presented within the time designated, though the passenger commences his journey at the earliest time possible and his delay is owing to the fault of one of the connecting lines. His remedy is against the line through whose fault he was not transported in time. *Gulf etc. R'y Co. v. Looney*, 787.

11. **PASSENGER TICKETS LIMITED AS TO THE TIME WITHIN WHICH THEY MAY BE USED MUST BE PRESENTED** before the expiration of such time, and if the ticket consists of several coupons, binding upon separate carriers, each coupon must be presented to the carrier named therein before the expiration of the time limited, and if presented after that time, need not be honored, though the other coupons had been presented within due time to the carriers bound by them, and through the fault of one of such carriers the passenger had been delayed so that it became impossible to present his last coupon within the time stipulated. *Gulf etc. R'y Co. v. Looney*, 787.

12. **A RAILWAY CORPORATION IS NOT ANSWERABLE FOR THE INJURIES TO A PASSENGER RESULTING FROM HER BEING JOSTLED AND PUSHED BY AN IMPATIENT MAN**, not an employee of the corporation, trying to enter the car from which she was alighting, thereby causing her to fall. *Ellinger v. Philadelphia etc. R. R.*, 697.

13. **RIGHT TO EXPEL PASSENGER FOR NONPAYMENT OF FARE.** — A conductor in charge of a railway train is authorized to expel, without using unnecessary force, a passenger who refuses to pay regular fare, at any point where he may safely get off, provided he is put off at a usual stopping place or near a dwelling house. *Roseman v. Carolina etc. R. R. Co.*, 524.

14. **RIGHT TO EXPEL INTOXICATED PASSENGER.** — When a passenger partially intoxicated is expelled from a railroad train by the conductor in charge for a refusal to pay fare and without using force, near a dwelling house and not remote from a station, the company is not liable for his subsequent death from exposure, if the conductor, though knowing of the intoxication, had no reasonable ground to believe that the ejected passenger was physically or mentally unable by reason of his intoxication, to find his way or walk to the nearest house or to the station, and he is not expelled when it is raining or freezing. *Roseman v. Carolina etc. R. R. Co.*, 524.

15. **RIGHT TO EXPEL INTOXICATED PASSENGER — DUTY TO CONSULT OPINIONS OF OTHER PASSENGERS.** — A railroad conductor in charge of a

- train is not bound to institute inquiry among the passengers as to the propriety of expelling a partially intoxicated passenger for refusal to pay fare, nor is he bound to act upon their opinions given after such expulsion, when he has no reason to believe that the intoxication has deprived the expelled passenger of the physical or mental capacity to find his way and walk to a neighboring house or to a station in the immediate vicinity. *Roseman v. Carolina etc. R. R. Co.*, 524.
16. **NEGLIGENCE OF IN USE OF ANOTHER COMPANY'S TRACK.**—A railroad company is responsible for accidents caused by a defective track, and is bound to exercise due care to safely carry passengers and property intrusted to it; it is therefore its duty to see that the road which it uses for such transportation, is safe and in good repair, whether such road is owned by it or not. If it uses the track of another company for such purpose, it is liable for damages to passengers or freight by reason of defects in the road of such other company so used by it, and this rule applies as between the company and its employees. *Wisconsin etc. R. R. Co. v. Ross*, 49.
17. **NEGLIGENCE — DUTY TO EMPLOYEE WHILE USING ROAD OF ANOTHER COMPANY.**—When an employee of a railroad company is directed to use the road of another company in the business of his employer, he has the right to treat such road as the road of his employer; and every railroad company whose employees use the road of another company under its direction or for its benefit owes it as a duty to such employees to see that such road is not in a condition which will unnecessarily endanger their lives or limbs. *Wisconsin etc. R. R. Co. v. Ross*, 49.
18. **ASSOCIATION OF RAILWAYS USING TRACK — JOINT AND SEVERAL LIABILITY FOR NEGLIGENCE.**—An association of railways running trains over the track of another company is liable to its servants for defects therein when it would be liable if the injury resulted from defects on its own track. In such case, the liability of such railways is joint and several. *Wisconsin etc. R. R. Co. v. Ross*, 49.
19. **MASTER AND SERVANT — FELLOW SERVANTS, WHO ARE.**—A railroad locomotive fireman and a station agent, who is also a telegraph operator in the employ of the same company, are fellow servants, and the company, if free from fault, is not responsible for the negligence of one of such servants resulting in injury to the other. *Reiser v. Pennsylvania Co.*, 620.
20. **MASTER AND SERVANT — VICE PRINCIPALS — NOTICE OF SERVANT'S INCOMPETENCY.**—A railroad train dispatcher, who has no power to employ or discharge the telegraph operators in the employ of the company, is not a vice principal as to them, and notice to such train dispatcher of the incompetency of such telegraph operators is not notice to the company so as to make it responsible for the negligence of an operator resulting in an injury to his fellow servant. *Reiser v. Pennsylvania Co.*, 620.
21. **RAILROADS IN PUBLIC STREETS — ORDINANCES REGULATING.**—When a city charter gives it the power of control over its streets, and the city council power to pass any ordinance, "usual or necessary for the well-being of the inhabitants," such city may limit the time which railroad trains may block the street by stopping. *Burger v. Missouri Pac. R'y Co.*, 379.
22. **RAILROADS IN STREETS — NEGLIGENCE IN STARTING TRAIN.**—In an action to recover for personal injury received while passing between cars

of a train unlawfully blocking the street, evidence that the injured party saw others passing between the cars before he attempted to pass is admissible, as bearing upon the negligence of the railroad company, in starting its train without a signal of warning. *Burger v. Missouri Pac. R'y Co.*, 379.

22. **NEGLIGENCE — PROXIMATE CAUSE — SUFFICIENCY OF COMPLAINT.**—A petition in an action against a railroad company for personal injury, charging that such company negligently and in violation of a city ordinance, stopped a train across a public street, and that while plaintiff was attempting to cross the street between the cars, such company, without warning, backed its train, thus inflicting the injury, states a good cause of action, and such two alleged causes of action are not independent of each other, or separable in the sense that one only would be the proximate cause of the injury. *Burger v. Missouri Pac. R'y Co.*, 379.
24. **RAILROADS IN STREETS — DUTY TO GIVE SIGNALS.** — When a railroad train has wrongfully and unlawfully taken the exclusive occupancy of a public street by stopping longer than is permitted by ordinance, and persons have congregated there to pass, and are passing between the cars, it is a question for the jury whether or not the railroad company may move its train without first giving timely warning of its intention, in order that persons in places of danger may protect themselves. *Burger v. Missouri Pac. R'y Co.*, 379.
25. **RAILROADS IN STREETS — DUTY AS TO SIGNALS.** — A statute requiring a railroad train approaching a public crossing to give signals by ringing a bell or sounding a whistle, is intended to give warning of the approach of a train, to persons who may be crossing or intending to cross the railroad over a public highway, but it does not follow that no other than the statutory signals are ever required, and such statute has no application to one who is attempting to cross the street by passing between two cars of a train which is blocking the street. *Burger v. Missouri Pac. R'y Co.*, 379.
26. **RAILWAY CORPORATIONS HAVE NOT THE EXCLUSIVE RIGHT TO THE HIGHWAYS** upon which they are permitted to run their cars, or even to the use of their own tracks. The public have the right to use these tracks in common with the railway corporations, and therefore it is not negligence *per se* for a citizen to be anywhere upon such tracks. *Gilmore v. Federal St. etc. R'y Co.*, 682.
27. **STREET RAILWAY CORPORATION OWES A DUTY** to exercise such watchful care as will prevent accidents or injuries to persons who, without negligence, may not be able to get out of the way of a passing car. *Gilmore v. Federal St. etc. R'y Co.*, 682.
28. **STREET RAILWAYS — CONTRIBUTORY NEGLIGENCE.** — If the driver of a team stops it in a dark alley, and leaves it upon the track of a street railway unhitched and unattended, he is guilty of negligence, and there can be no recovery against the railway corporation for injuries suffered by the collision of its street car with such team, though the motor man of such car was also guilty of negligence in running it at a rapid rate of speed through such alley. *Gilmore v. Federal St. etc. R'y Co.*, 682.
29. **STREET RAILWAYS.** — IT IS NEGLIGENCE TO RUN A CAR ALONG A DARK AND UNLIGHTED ALLEY on a dark night at a rate of speed that will not permit its stoppage within the distance covered by its own headlight. *Gilmore v. Federal St. etc. R'y Co.*, 682.

30. STREET RAILWAYS — NEGLIGENCE. — **THOUGH A CHILD OF TENDER YEARS RUNS SUDDENLY UNDER A STREET CAR,** yet if the gripman was not attending to his business, and was standing on the side of the cab with one hand out of the window looking towards the houses, and did not have hold of the grip or brake, and paid no attention to persons who halloed to him when they saw the danger of the child, it is proper to submit the case to the jury for them to determine whether or not the injuries suffered by the child were due to the negligence of the railway corporation. *Schur v. Citizens' Traction Co.*, 680.

31. STREET RAILWAYS. — **IT IS THE DUTY OF THE GRIPMAN** of a street railway car to keep his eyes on the track before him, and not to gaze at houses or other objects while the car is in motion; and if an accident occurs through his neglect of these duties, his employer is answerable. *Schur v. Citizens' Traction Co.*, 680.

See ATTACHMENT, 7; CARRIERS; CONTRACTS, 15; MANDAMUS, 2, 4, 6.

REAL PROPERTY.

See CORPORATIONS, 8, 12; DESCENT; EASEMENTS; GUARDIAN AND WARD, 1, 2; HUSBAND AND WIFE, 10; MINING; MUNICIPAL CORPORATIONS, 9; NUISANCE, 1; PARTNERSHIP, 5-7; VENDOR AND PURCHASER; WILLS, 10-12.

RECEIVERS.

JUDGMENTS — PAYMENT AND SATISFACTION. — When a receiver, appointed at the request of a judgment debtor, fails to pay a judgment creditor an amount ordered by the court to be paid to him, and such failure is without the fault or negligence of the judgment creditor, the judgment debtor cannot claim payment on the judgment to the amount ordered paid, and the loss must fall on him individually. *Vanstoy v. Thornton*, 482.

See CONTEMPT.

RECTALS.

See EVIDENCE, 3; MANDAMUS, 5.

RECORDS.

See APPEAL, 2, 5; DEEDS, 6; JUDGMENTS, 3; VENDOR AND PURCHASER, 1.

REFORMATION.

See SPECIFIC PERFORMANCE, 1; WILLS, 2.

RELATOR.

See MANDAMUS, 4, 6.

REMAINDERS.

See ESTATES.

REMARRIAGE.

See MARRIAGE AND DIVORCE, 12.

RENEWAL.

See LIMITATIONS OF ACTIONS, 10; NEGOTIABLE INSTRUMENTS, 4.

RENTS.

See GUARDIAN AND WARD, 2; VENDOR AND PURCHASER, 2

REPUGNANCY.

See DEEDS, 1, 2, 4.

RESCISSION.

See SALES, 14.

RES GESTÆ.

See DOMICILE, 2.

RESIDENCE.

See DOMICILE; HOMESTEAD, 1.

RES JUDICATA.

See MARRIAGE AND DIVORCE, 12.

RETURN.

See CREDITOR'S SUIT, 2.

REVOCATION.

See DEEDS, 3, 6; GRANTS.

RIPARIAN RIGHTS.

See WATERCOURSES.

SALES.

1. **CONTRACTS FOR THE SALE OF GOODS TO BE DELIVERED IN THE FUTURE, WHEN ILLEGAL.** — A contract by which a person agrees to buy or sell, for future delivery, a commodity which he does not own at the time the contract is made, and which must be obtained by purchase in the open market when the time for delivery arrives, is valid only when the parties really intend that the commodity is to be delivered and the price paid. If it is the understanding of the parties, whether expressed or not, that the commodity is not to be delivered, but that one party is to pay to the other the difference between the contract and the market prices at the date fixed for executing the contract, then the whole transaction constitutes nothing more than a wager, and is null and void. *Lester v. Buel*, 556.
2. **SALES ON CREDIT — PROPER TIME FOR DELIVERY OF THE GOODS.** — When the purchaser of goods sold on credit agrees to give his negotiable paper for the price, but no time has been specified for delivery, the obligation of the vendor is to deliver the goods upon receipt or tender of such negotiable paper, and not at the time to which credit is extended. *Diem v. Koblitx*, 531.
3. **SALES ON CREDIT — VENDOR, WHEN JUSTIFIED IN RESELLING PROPERTY SOLD.** — Where goods are sold on credit, but no express stipulation is made as to the time of delivery, the vendor, upon ascertaining, while the goods are still in his hands or in the custody of the carrier, that

the vendee is insolvent, is entitled not merely to retain or to resume possession of the goods, but also to resell them without waiting for the expiration of the period of credit. The insolvency of the vendee, under these circumstances, amounts to such inability on his part to perform the contract as will justify the vendor in treating the agreement for credit as at an end, and, therefore, no action for damages can be maintained by the former against the latter for failure to deliver the goods. *Diem v. Koblitz*, 531.

4. **SALES ON CREDIT — OBLIGATION OF VENDEE TO KEEP HIS CREDIT GOOD.** Since the promise of the vendee to pay at a future day involves an engagement on his part that he will remain and then be able to pay, it is one of the implied conditions in a contract for the sale of goods on credit that he shall keep his credit good. That engagement is broken when he becomes insolvent, and hence arises the right of the vendor to stop the performance of the contract on his part. *Diem v. Koblitz*, 531.
5. **RIGHT OF STOPPAGE IN TRANSITU CONTINUES** not only while the goods are in transit, but until they have reached their destination and been delivered into the actual or constructive possession of the consignee. *Harris v. Tenney*, 796.
6. **STOPPAGE IN TRANSITU. — GOODS WHICH HAVE BEEN SHIPPED TO THE PURCHASER** and which are on drays in process of being carried from a railway depot to the store of the vendee, are still subject to the right of stoppage *in transitu*. The placing of the goods on drays, though done at the instance of the purchaser, is not such a delivery as defeats the right of stoppage *in transitu*. *Harris v. Tenney*, 796.
7. **STOPPAGE IN TRANSITU, RIGHT OF, WHEN ARISES.** — The right of stoppage *in transitu* is the right of the vendor to resume possession of the goods sold while they are in transit to the vendee, who is insolvent, or in embarrassed circumstances. Actual insolvency is not essential. It is sufficient if, before the stoppage, the vendee was either in fact insolvent or had, by his conduct in business, afforded the ordinary apparent evidences of insolvency. *Diem v. Koblitz*, 531.
8. **STOPPAGE IN TRANSITU, RIGHT OF, NOT AFFECTED BY ACCEPTANCE OF VENDEE'S NEGOTIABLE PAPER.** — The vendor's right of stoppage *in transitu* is not abridged, nor in any way affected, by the circumstance that he has received the vendee's bill of exchange, or other negotiable securities, for the whole price, even though they have been negotiated, and are still outstanding. *Diem v. Koblitz*, 531.
9. **STOPPAGE IN TRANSITU, RIGHTS OF VENDOR, HOW AFFECTED BY.** — The effect of the exercise of the right of stoppage *in transitu* is to restore the vendor to precisely the same position as if the property had never left his hands. He has the same rights with regard to it, and those rights may be enforced in the same way. *Diem v. Koblitz*, 531.
10. **STOPPAGE IN TRANSITU — DELIVERY TO AN AGENT OF ATTACHING CREDITOR.** — If the purchaser of goods on credit, has become insolvent and the goods have not been delivered to him but are in the possession of a carrier, an attaching creditor, or a person acting for such creditor, will not be allowed to become the agent or representative of the purchaser for the purpose of procuring or accepting delivery of such goods and thereby cutting off the right of the vendor to stop them in transit. If the vendor loses this right, it must be by the usual course of events or such as occurs without combination, connivance or co-operation of the purchaser and the attaching creditor. *Harris v. Tenney*, 796.

11. **ATTACHMENT OF GOODS WHILE IN TRANSIT** does not impair the vendor's right of stoppage *in transitu*. *Harris v. Tenney*, 796.
 12. **STOPPAGE IN TRANSITU. — DELIVERY OF GOODS AT A STOREHOUSE FORMERLY OCCUPIED BY THE PURCHASER** but at the time in the possession of a sheriff by virtue of seizure under attachment, is not a delivery to the purchaser, and a levy thereafter made cannot affect the vendor's right of stoppage *in transitu*. *Harris v. Tenney*, 796.
 13. **STOPPAGE IN TRANSITU. — DELIVERY TO A CARRIER UNDER AN ORDER OF THE CONSIGNEE** is not such a constructive delivery to him as will interfere with the consignor's right of stoppage *in transitu*. *Harris v. Tenney*, 796.
 14. **MUTUAL DUTIES AND OBLIGATIONS OF THE VENDOR AND VENDEE — AFTER A STOPPAGE IN TRANSITU. —** Stoppage *in transitu* of goods sold on credit does not rescind the contract; but unless the vendee is ready to perform the contract on his part by paying the price when the time for delivery arrives, he cannot require the seller to perform the contract on his part by completing the delivery. *Diem v. Koblitz*, 531.
- See** AGENCY, 6; CONTRACTS, 3, 4; DAMAGES, 2; CUSTOM; EXECUTIONS; FACTORS; FRAUDULENT CONVEYANCES; HOMESTEAD, 7, 9; HUSBAND AND WIFE, 10; MORTGAGES, 3; NEGOTIABLE INSTRUMENTS, 10; VENDOR AND PURCHASER; WILLS, 10-14.

SEPARATE PROPERTY.

See HUSBAND AND WIFE, 1-5.

SERVICES.

See ASSIGNMENT, 1; INFANTS, 1, 2; MASTER AND SERVANT.

SERVITUDES.

See EASEMENTS; WATERCOURSES, 1, 2.

SET-OFF.

See ESTATES, 1.

SEWERS.

See GAS COMPANIES, 2.

SHERIFFS.

SHERIFF REFUSING TO RECOGNIZE A VENDOR'S RIGHT OF STOPPAGE IN TRANSITU and thereafter selling goods which are subject to that right is answerable for their value to such vendor. *Harris v. Tenney*, 796.

See PARTIES.

SHIPPING.

See ADMIRALTY.

SLANDER.

See LIBEL, 5.

SOCAGE.

See GUARDIAN AND WARD, 1-3, 6.

SODOMY.

EMISSION IS NECESSARY to the consummation of the crime of sodomy, and, while it may be inferred from proof of penetration and the circumstances of the case, yet it is a fact which the prosecution must prove before a conviction can be claimed. *People v. Hodgkin*, 320.

SPECIFIC PERFORMANCE.

1. **WHAT SHOULD BE SHOWN IN THE PETITION.** — Where a contract describing land to be conveyed is indefinite and uncertain, and therefore to be reformed on account of the mutual mistakes or omissions of the parties, or where it can be made sufficiently definite and certain by extrinsic evidence, the petition should show all the facts, and what is desired before a specific performance is decreed; and all the matters in controversy, both as to the reformation of the contract, if that be necessary, or the identification of the property by extrinsic evidence, should be settled and disposed of in the same action. *Bacon v. Leslie*, 134.
2. **VENDOR AND VENDEE — OPTION TO PURCHASE CONTAINED IN LEASE — ASSIGNMENT AND SPECIFIC PERFORMANCE OF.** — An agreement by a landlord contained in a lease to convey the leased land to the tenant upon the expiration of the term and the payment of an agreed purchase price gives the tenant a right to purchase which will pass to his administrator and to the assignee of the latter; and upon the payment of the purchase price by such assignee within the time limited, the contract of purchase becomes complete, and may be specifically enforced in equity. *Gustin v. Union School Dist.*, 361.
3. **MUTUALITY OF CONTRACT.** — Though, because of the coverture or infancy of one of the parties to an executive contract, it is not enforceable against her, yet if she performs or tenders performance of her part of the contract, equity will at her instance compel performance by the other contracting party. *Yerkes v. Richards*, 721.
4. **SUFFICIENCY OF DESCRIPTION.** — In an action for the specific performance of a contract for the sale of land, it is not essential that the description of the land in the writing which evidences the contract should be given with such particularity as to make a resort to extrinsic evidence unnecessary. If the designation of the land is so definite that the purchaser knows exactly what he is buying, and the seller what he is selling, and the land is so described that the court can, with the aid of extrinsic evidence, apply the description to the exact property intended to be sold, it is enough. *Bacon v. Leslie*, 134.
5. **EXTRINSIC EVIDENCE TO AID DESCRIPTION IN WRITTEN CONTRACT.** — A description of property in a written contract for the exchange of land as “ $\frac{1}{2}$ of section 7-23-7, and all of section 18-23-7, in Sycamore township, Butler County, Kansas,” is not so uncertain and indefinite that a decree for specific performance of the contract will be refused if the petition for such specific performance alleges and it is proven upon the trial, that, “at the time of the execution of the agreement, the defendant was the owner of section eighteen and the south half of section seven, all in township twenty-three south, of range seven east, in Butler County, Kansas, and was not the owner of any other real estate in said section seven.” *Bacon v. Leslie*, 134.

6. **DEFENSES — CONTEMPORANEOUS PAROL AGREEMENT.** — A parol contract made contemporaneously with a written contract for the exchange of land, as a part thereof or in connection therewith, cannot be introduced as a defense to an action for the specific performance of the written contract, if it alters, varies, or contradicts the latter. *Bacon v. Leslie*, 134.
7. **DEFENSES — EVIDENCE INSUFFICIENT TO SHOW FRAUD.** — Where the testimony shows that the defendant, in an action for specific performance of a contract for the exchange of land, has resided for over twenty years within a short distance of the land which is to be conveyed to him, and that he has seen and had opportunity to examine the property before he signed the contract, it cannot be said that any fraud, either to obtain his signature or otherwise, has been established. *Bacon v. Leslie*, 134.
8. **GROUND FOR REFUSING.** — An unconscionable price, a clouded title, any circumstance of overreaching, misrepresentation, suppression of the truth, suggestion of the false, fraud of any kind, breach of confidential relation, and many other similar causes will induce a court to refuse specific performance. *Friend v. Lamb*, 672.
9. **MARRIED WOMEN'S CONTRACTS.** — When a contract entered into by a married woman for the purchase of land seems to be improvident and oppressive, her state and condition as being a married woman will be taken into consideration in determining whether or not a decree for specific performance should be made against her. *Friend v. Lamb*, 672.
10. **IMPROVIDENT AND OPPRESSIVE CONTRACT BY MARRIED WOMAN.** When a married woman has entered into an improvident and oppressive contract for the purchase of land at an unconscionable price and has agreed to give a mortgage on other property for a large sum to secure the first two payments under the contract, the fact that such additional security is required together with a controverted question of fact as to when possession is to be delivered to the vendee, is sufficient ground for refusing specific performance. *Friend v. Lamb*, 672.
11. **IMPROVIDENT AND OPPRESSIVE CONTRACT BY MARRIED WOMAN.** When a married woman enters into an improvident and oppressive contract for the purchase of land at an unconscionable price and the chief inducing cause of the contract on the part of the vendee is the supposed presence of a large body of coal as represented by the vendor when such coal has been removed, specific performance of the contract will be refused. *Friend v. Lamb*, 672.
12. **DISCRETION OF COURT.** — A decree for specific performance is not granted as a matter of course but rests in the sound discretion of the court, and even when the agreement is perfectly good, the price adequate, and no blame attaches to the purchase, specific performance may be denied, and the parties turned over to their remedy in damages, if the transaction is inequitable and unjust in itself, or is rendered so by matters subsequently occurring. *Friend v. Lamb*, 672.

See APPEAL, 5.

STATES.

See ABATEMENT; ADMIRALTY; ATTACHMENT, 6-8; COMMERCE, 1; CORPORATIONS, 6, 17-22; EVIDENCE, 1; INSURANCE, 13-17; JURISDICTION, 13; QUO WARRANTO.

STATIONS.

See MANDAMUS, 2, 4, 6; RAILROADS, 1.

STATUTE OF FRAUDS.**See TRUSTS, 3.****STATUTE OF LIMITATIONS.****See LIMITATIONS OF ACTIONS.****STATUTES.**

CONSTRUCTION OF — EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS. — A clause in a statute which confers upon all cities the power "to make such ordinances, etc., not inconsistent with the constitution of the state as may be deemed expedient to maintain their peace, good government, and welfare," may, when taken by itself, be construed as conferring by implication upon every city the right to restrain animals from running at large. But if the same statute divides the cities of the state into four classes, and expressly confers upon the second and third class the right of so restraining animals, and is silent as to the exercise of the right by cities of the fourth class, and it also appears that it was the evident intention of the legislature to confer many powers upon the larger cities which were withheld from the smaller ones, the inference must be that there is no implied grant of the right in question to cities of the fourth class. *Wilson v. Beyers*, 858.

See ABATEMENT, 1; ACTIONS, 1; ADMIRALTY; ATTACHMENT, 4, 6; ATTAINDER, 1; COMMON LAW; CORPORATIONS, 3, 21; DESCENT; ESTATES, 2; HOMESTEAD, 5, 6; HUSBAND AND WIFE, 7; INDIOTMENT; INSURANCE, 13, 14, 16, 17; MARRIAGE AND DIVORCE, 10; MASTER AND SERVANT, 10; OFFICERS, 1; RAILROADS, 25.

STOCK.**See CONTRACTS, 6; CORPORATIONS, 1-4; INSURANCE.****STOCK BOOKS.****See CORPORATIONS, 1, 3, 4.****STOCKHOLDERS.****See CONTRACTS, 6, 15; CORPORATIONS, 5, 6.****STOPPAGE IN TRANSITU.****See PARTIES; SALES, 5-14; SHERIFFS.****STORAGE.****See FACTORS, 3.****STREET RAILWAYS.****See RAILROADS, 26-31.****STREETS.**

See HIGHWAYS, 1, 2; MUNICIPAL CORPORATIONS, 9, 10, 17; PLEADING, 1; RAILROADS, 21-31.

SUBCONTRACTORS.**See MECHANIC'S LIEN, 3, 4.**

SUBSCRIPTION.

See **INSURANCE**, 14.

SURETYSHIP.

1. **LIABILITY OF SURETY FOR DEFALCATIONS OF BANK CLERK.** — A surety on the bond of a bank clerk is not liable for loss to the bank caused by employing him out of his sphere; but, if it is shown, that the extra duties had nothing to do with the loss, but that it was caused by the clerk's conduct in the sphere of his own office, or by a wrongful use of the opportunities afforded by that office, the surety may be held, unless there is an express provision in the bond that such extra duties shall avoid it. *Garnett v. Farmers' Nat. Bank*, 246.
2. **ASSIGNMENT OF EXTRA DUTIES TO EMPLOYEE, HOW FAR AFFECTS LIABILITY OF SURETY.** — The sureties on the bond of a bank clerk are liable for the money of which he has defrauded the bank by means of false entries and erasures in books of which he has the exclusive charge, but not for the money which his occasional performance of the functions of the regular cashier, during the absence of that officer, enables him to appropriate. In the latter case the bank will be regarded as having empowered him, at its own risk, to assume the more responsible duties of cashier, and as being consequently without remedy on the bond for any wrong he was tempted or enabled to commit by reason of being employed in that capacity. *Garnett v. Farmers' Nat. Bank*, 246.
3. **SURETIES, DECREASE OF ONE OF SEVERAL.** — The estate of a deceased surety upon a guardian's bond, joint and several in form, remains liable after his death. *Douglass v. Ferris*, 435.
4. **A GUARDIAN'S SURETIES ARE NOT RELEASED** by a settlement made by him with his ward after the latter comes of age, and a decree entered thereon by the surrogate adjudging that the guardian had fully accounted, if such settlement was procured by fraud and misrepresentation, and it and the decree are subsequently annulled in an action brought for that purpose against such guardian. The effect of the annulment was to make the settlement and decree void *ab initio*, and of no more legal effect than if they had never existed. *Douglass v. Ferris*, 435.
5. **A JUDGMENT AGAINST A GUARDIAN IS CONCLUSIVE UPON HIS SURETIES** where it annuls the settlement made by him with his ward, and fixes the amount of his liability to such ward, if the condition of their bond was that the guardian, "should well and faithfully discharge his duties, and render a just and true account of all moneys and properties received by him, and of the application thereof, and of such guardian in all respects to and before any court having cognizance thereof when thereunto required." *Douglass v. Ferris*, 435.
6. **SURETIES OF GUARDIAN, LACHES IN PROCEEDING AGAINST.** — Mere indulgence by a ward of his guardian after coming of age, without any valid agreement for delay or the extension of time, does not affect the obligation of the sureties, nor are such sureties released by any agreement procured from the ward through fraud, and which he, on discovering the fraud, resists and procures to be annulled. *Douglass v. Ferris*, 435.
7. **SURETIES OF GUARDIAN, WHEN LIABLE FOR COSTS.** — If an action is brought against a guardian to settle his accounts, and a judgment is entered therein for the amount found due and for costs of suit, the sureties are liable for such costs; but if there was never any issue as to the amount

of the guardian's liability, and the suit was to set aside a settlement with the ward procured by the fraud of the guardian, the sureties, not being instrumental in the settlement, are not chargeable with the costs incurred in procuring its annulment. *Douglass v. Ferris*, 425.

See GUARDIAN AND WARD, 4; OFFICERS, 2-4.

SURFACE WATERS.

See WATERCOURSES, 1, 2.

SUSPENSION.

See ASSOCIATIONS, 2, 3.

TELEGRAPH COMPANIES.

1. A TELEGRAPH CORPORATION IS NOT CHARGEABLE WITH NOTICE THAT THE WIFE OF A PERSON TO WHOM A MESSAGE IS ADDRESSED IS RELATED to a person whose death is announced therein, when the company had no knowledge of the existence of the wife, nor of her relationship to the decedent. *Western U. Tel. Co. v. Carter*, 826.
2. WHEN A MESSAGE CONVEYING INFORMATION OF THE DEATH OR SERIOUS ILLNESS of another person is not delivered through the negligence of the telegraph corporation, it is not necessary, to sustain recovery of damages by the addressee, that the message on its face disclose his relationship to such ill or deceased person. In such a case, the telegraph corporation is chargeable with notice of the relationship existing between the parties named in the message, and of the purposes for which the communication is made. *Western U. Tel. Co. v. Carter*, 826.
3. CONTRIBUTORY NEGLIGENCE.—A telegraph corporation failing to deliver a message informing a father of the fatal illness of his child and requesting his immediate presence, cannot escape liability on the ground that the agent of the father who sent the message could, on learning that the father did not arrive on the next train, have gone to where he was and there informed him of the facts disclosed by the message and thereby have enabled the father to reach his child before its death. *Western U. Tel. Co. v. Wisdom*, 805.
4. DAMAGES FOR THE NONDELIVERY OF A MESSAGE ANNOUNCING THE DEATH OF A PERSON cannot include a sum expended by the addressee in exhuming the body of the decedent because, owing to the nonreceipt of the message, it did not receive proper care in respect to interment. *Western U. Tel. Co. v. Carter*, 826.
5. DAMAGES FOR THE NONDELIVERY OF A MESSAGE ANNOUNCING THE DEATH of a person cannot include a sum awarded for mental anguish caused by the manner and place of his burial. *Western U. Tel. Co. v. Carter*, 826.

THEATRES.

See ACTIONS, 6.

THREATS.

See HOMICIDE, 2.

TICKETS.

See RAILROADS, 8-11.

TIMBER.

See WASTE.

TORTS.

See ACTIONS, 2, 4; JOINT LIABILITY; MUNICIPAL CORPORATIONS, 15, 16;
RAILROADS, 3.

TRADE.

See COMMERCE, 1; INSURANCE, 16.

TRESPASS.

See GUARDIAN AND WARD, 2; NUISANCE, 7; WATERCOURSES, 3, 4.

TRIAL.

1. LIBEL — QUESTION FOR JURY. — When a publication charges a township board with granting a franchise and the officers composing such board, naming them, and a highway commissioner, naming him, with signing it, and then refers to the transaction as suspicious, and to the opinion that "boodle" had been used in obtaining the franchise, it is for the jury to say whether or not from the whole of the article published, the language used applies to the highway commissioner as well as to the township board. *Boehmer v. Detroit Free Press Co.*, 318.
 2. SPECIAL QUESTIONS SHOULD NOT BE SUBMITTED TO THE JURY when there is no evidence to warrant them, or when they relate to points not in dispute, or to elements of damages which are wholly withdrawn from the jury by the charge. *Parkinson Sugar Co. v. Riley*, 123.
 3. GAMBLING TRANSACTIONS IN STOCKS, EVIDENCE TO PROVE. — In determining what the intentions of the parties were, when it is claimed that their transactions consist of gambling in stocks, the jury has the right to consider the nature and character of the accounts between them, the acts of the parties, and all the circumstances surrounding their transaction so far as disclosed by the testimony, and may go behind the mere form given to the transaction and ascertain from all the evidence the real purpose of the parties and the actual character of their dealings with each other. *Gaw v. Bennett*, 699.
- See AGENCY, 3; APPEAL; ERROR, 2, 3; FRAUDULENT CONVEYANCES, 1, 2, 6; GAS COMPANIES, 3; LIBEL, 6, 9, 11, 13; MASTER AND SERVANT, 1, 4; NEGLIGENCE, 4-6; RAILROADS, 30; WAGERS, 1; WILLS, 7, 9.

TROVER.

1. WHAT ALLEGATIONS ARE NECESSARY IN AN ACTION FOR. — The petition in an action for conversion need not contain an allegation that the plaintiff demanded the property, and that the defendant refused to deliver it. If the plaintiff's ownership of the property and its value are properly alleged, and there is an averment that the defendant converted such property to his own use, a cause of action is sufficiently stated. *Railroad Co. v. O'Donnell*, 579.
2. CONVERSION OF GOODS BY CARRIER, PREREQUISITES TO ACTION FOR. — The consignee of property cannot maintain an action against the carrier for its recovery without first tendering the amount of the carrier's legal charges and advances, but such tender is not a prerequisite to an action for damages for the unlawful conversion of the property by the carrier. *Railroad Co. v. O'Donnell*, 579.

3. **CONVERSION BY CARRIER — WHAT CONSTITUTES.** — A common carrier, who, having received goods to be conveyed to a designated place, transports them to another place, in order to prevent their coming into the possession of the consignee and to deprive him of their use and disposition, is liable for the conversion of such goods. *Railroad Co. v. O'Donnell*, 579.
4. **THE OWNER OF PROPERTY CONVERTED IS NOT OBLIGED TO RECEIVE IT AFTER THE CONVERSION.** — Hence, if a carrier has once been guilty of the conversion of goods delivered to him for transportation, no tender of the goods to the owner, nor refusal by such owner to receive them, will have the effect of relieving the carrier from liability for their subsequent loss. *Railroad Co. v. O'Donnell*, 579.
5. **MOTIVE OF PERSON CONVERTING PROPERTY, NOT AVAILABLE AS A DEFENSE.** — The motive by which a party was controlled in the conversion of property may be shown to prevent the recovery of exemplary damages, but is of no avail as a defense to an action of trover. *Railroad Co. v. O'Donnell*, 579.
6. **CONVERSION OF GOODS BY CARRIER. — THE MEASURE OF DAMAGES** in an action for mere delay in the delivery of goods is ordinarily the difference between their value on the day on which they should have been delivered and their value on the day on which they are actually ready for delivery, and, in addition to that amount, reasonable expenses occasioned by the delay may also be allowed in such a case. But, if there has been a conversion of the goods, the measure of damages is their value at the time of the conversion, and the fact that the consignee has afterwards had an opportunity of receiving them, and has refused to take them, is not a ground for applying a different rule. *Railroad Co. v. O'Donnell*, 579.

TRUSTEES.

See RAILROADS, 2-4.

TRUSTS.

1. **WILLS — CREATION OF TRUST.** — The intention of a testator to create a trust must be apparent from the face of his will, apart from the mere existence of words of trust and confidence, or none will be deemed to exist. *Boyle v. Boyle*, 629.
2. **GIFTS — DECLARATION OF DONOR THAT HE HOLDS IN TRUST FOR DONEE.** The title to personal property may be transferred by a clear and unequivocal declaration on the part of the donor that he holds the property in trust for the donee, or by acts which are equivalent to such a declaration. Under these circumstances, if the donee shows that the donor has left nothing undone that is necessary to create the trust, and nothing is required of the court but to give effect to it as an executed trust, it will be enforced, although it was without consideration, and the possession of the property has not been changed. *Williamson v. Yager*, 184.
3. **DECLARATIONS OF TO SATISFY STATUTE OF FRAUDS.** — While a declaration of trust need not be contained in the conveyance to the trustee, and any form of instrument, whether a letter addressed to a third person, or the answer of an alleged trustee in a chancery proceeding, will be sufficient to answer the requirements of the statute of frauds when there is no prescribed form of words in which the declaration must be made in order to make it valid, yet it must contain the substantial terms of

the trust, or at least sufficient to identify the subject-matter by writing. *Rens v. Stoll*, 358.

1. **WILLS — CONSTRUCTION OF PRECATORY WORDS.** — A provision in a will that "I give and bequeath to my wife all my property, real and personal, for her support during her natural lifetime; any remainder at her decease to be disposed of by her as she may think just and right among my children," imports a gift, and gives to the wife upon the death of the testator a fee in the property with all its incidents, including the power to sell and to devise. The words referring to any remainder do not limit the wife's estate or the preceding words of gift, but are precatory, and do not create a trust in favor of the children. *Boyle v. Boyle*, 629.

2. **WILLS — PRECATORY TRUSTS, WHEN NOT CREATED.** — Mere precatory words, or words of command or of explanation, contained in a will, are not enough to create a trust, or to establish an intention not to be gathered from a consideration of the operative words upon the face of the instrument. *Boyle v. Boyle*, 629.

3. **DISCRETIONARY, POWER OF COURT TO CONTROL.** — If a trust is created under which a trustee has power to use so much of the principal as he shall deem necessary for the benefit of the beneficiary, who has the power of absolute testamentary disposition of the residue, a legal discretion is vested in the trustee, which, in a proper case, the court may control for the benefit of the beneficiary. *Stewart v. Madden*, 713.

4. **TRUST PROPERTY, WHEN LIABLE FOR DEBTS OF BENEFICIARY AFTER HER DEATH.** — If a wife conveys property in trust, giving the trustee authority to sell so much thereof as he shall deem necessary for her benefit, and reserves to herself the issues and profits of the estate held by the trustee, and the power of testamentary disposition of the residue, and, in the absence of such disposition, provides that such surplus shall vest in her children, the orphans' court may, after her death, direct the sale of the property subject to such trust, if required to pay the debts incurred for necessities which her husband was unable to pay. *Stewart v. Madden*, 713.

5. **TRUST FUNDS — RIGHT TO PURSUE.** — A *cestui que trust* has the right to follow trust funds, and to appropriate to himself the property into which such funds have been changed, together with the increased value of such property, provided the funds can be clearly ascertained, traced, and identified, and the right of *bona fide* purchasers do not intervene. *Holmes v. Gilman*, 463.

See ACKNOWLEDGMENT; CONTRACTS, 6; CORPORATIONS, 3, 4; PARTNERSHIP, 1, 2.

ULTRA VIRES.

See CORPORATIONS, 6-10; MUNICIPAL CORPORATIONS, 15, 16.

UNDERWRITERS.

See ASSOCIATIONS, 2.

UNDUE INFLUENCE.

See DEEDS, 5.

INDEX.

UNILATERAL.

See CONTRACTS, 5; VENDOR AND PURCHASER, 2.

USAGE.

See CUSTOM; INSURANCE, 11.

USURY.

See ATTACHMENT, 8; NEGOTIABLE INSTRUMENTS, 6.

VACANT AND UNOCCUPIED.

See INSURANCE, 7.

VENDOR AND PURCHASER.

1. **PURCHASERS WITH NOTICE.** — If one purchasing land standing of record in the names of two persons is informed before the purchase that one of such persons, or his grantee, claimed the whole of such land, the purchase must be regarded as subject to such claim, and therefore liable to be defeated by proof that the land had been acquired by the two persons as partners, and had been set aside to one of them on a settlement of their partnership business. *Murrell v. Mandelbaum*, 777.
 2. **OPTIONS TO PURCHASE IN UNILATERAL CONTRACTS — EFFECT OF.** — Options for the purchase of land upon unilateral contracts do not vest any interest in the vendee, and become binding only by acceptance or performance of their conditions before the offer is withdrawn. *Gustin v. Union School District*, 361.
 3. **OPTION TO PURCHASE CONTAINED IN LEASE — CONSIDERATION.** — Rent reserved in a lease is a sufficient consideration for an agreement by the landlord therein contained to convey the land to the tenant upon the expiration of the term and upon the payment of an agreed purchase price. *Gustin v. Union School District*, 361.
 4. **CONTRACTS, OPTIONAL — DAMAGES FOR FAILURE TO PERFORM.** — If a landowner makes an agreement purporting to give A B, agent, the right to purchase certain real property on or before a time and at a price designated in the agreement, the wife of such agent may maintain an action against such landowner for damages, on proving that the option was taken for her benefit, and that within the time stipulated she tendered the price named. *Yerkes v. Richards*, 721.
- See APPEAL, 5; BROKERS, 2-4; SALES; SPECIFIC PERFORMANCE, 1, 2, 4-8.

VERDICT.

See APPEAL, 6.

VERIFICATION.

See MARRIAGE AND DIVORCE, 7; PLEADING, 5.

VESSELS.

See ADMIRALTY.

VESTRY.

See JUDGE.

VICE PRINCIPAL

See MASTER AND SERVANT, 8, 9; RAILROADS, 20.

WAGERS.

1. **A WAGERING CONTRACT** is one in which the parties, in effect, stipulate that they shall gain or lose upon the happening of an uncertain event in which they have no interest except that arising from the possibility of such gain or loss, and whether the contract is a wagering one or not is a question for the jury, unless the entire contract, unexplained by oral testimony, is in writing. *Gaw v. Bennett*, 699.
2. **WAGERING CONTRACTS — PURCHASE ON MARGIN — DELIVERY.** — A purchase of stock merely on margin for speculation is not necessarily a gambling transaction. If there is not, under any circumstances, to be a delivery as part of and completing the purchase, then the transaction is a mere wager on the rise and fall of prices; but if there is in good faith a purchase, the delivery may be postponed, or made to depend upon a future condition, and the stock carried on margin, or otherwise in the meantime, without affecting the legality of the operation. *Peters v. Grim*, 599.
3. **RIGHT OF THE LOSER TO RECOVER MONEY PAID TO THE WINNER.** If the evidence shows that an agreement for the future delivery of commodities is a wagering contract, to be performed by the adjustment of the difference between the market and the contract price at the date fixed for its execution, the mere fact that one of the parties has professed to act in the character of a broker will not render him the less liable to the penalties of the law, nor constitute a defense to an action in which the other party seeks, under the provisions of a statute giving the loser of a wager the right to recover the money transferred to the winner, to recover the sum paid by him for the purpose of making that adjustment. *Lester v. Buel*, 556.

See BROKERS, 1; SALES, 1.

WAGES.

See ASSIGNMENT, 1; ATTACHMENT, 4; PARENT AND CHILD.

WAIVER.

See ATTACHMENT, 4; INFANTS, 4; INSURANCE, 3, 5, 6; LIMITATIONS OF ACTIONS, 10.

WAREHOUSEMEN.

See EXPRESS COMPANIES.

WARRANTY.

See BAILMENT.

WASTE.

1. **THE CUTTING OF ORNAMENTAL TIMBER BY A LIFE TENANT IS WASTE.** *Calvert v. Rice*, 240.
2. **RIGHT OF LIFE TENANT TO CUT TIMBER.** — A life tenant has the right to cut timber for firewood and for the repair of the buildings on the estate. The scarcity of timber does not prevent its use by a life tenant for those purposes, but merely imposes upon him the duty of

being more careful in its use, and of cutting only so much as is reasonably necessary to keep the premises in good condition, or so much as would be used by a prudent man who was the owner of the fee and in possession of the land. *Calvert v. Rice*, 240.

See GUARDIAN AND WARD, 2.

WATERS.

1. DRAINAGE—DOMINANT AND SERVIENT ESTATES. — An upper proprietor has a right, by means of underground and artificial drains, to collect surface water on his land, and discharge it upon the land of the lower proprietor at a single point which is the natural water shed of both tracts, and at which there is an open ditch on the lower land; although a larger quantity of water is thus discharged at that point than would naturally flow there by surface drainage, provided that in so doing, care is taken not to cause unnecessary injury to the owner of the lower land. *Meixell v. Morgan*, 614.
2. DRAINAGE—RIPARIAN RIGHTS. — An upper owner may drain his ground of surface water, and discharge it according to its natural channel, may cover up and conceal the drains through his lands, may use running streams to irrigate his fields, though he thereby diminishes, not measurably, the supply of his neighbor below, and may clear out impediments in the natural channel of his streams, though the flow of water on his neighbor's land is thereby increased. *Meixell v. Morgan*, 614.
3. RIPARIAN RIGHTS — NAVIGATION — CONFLICT BETWEEN — DAMAGES. — The right of navigation on a river gives only a right to temporary moorings between high and low watermark, and any use of private property beyond that and for a permanent mooring renders the navigator a trespasser and liable in damages, although he does not inconvenience the private owner's approach to the shore, and the latter makes no use of the property. *Wall v. Pittsburgh Harbor Co.*, 667.
4. RIPARIAN RIGHTS — NAVIGATION — CONFLICT BETWEEN — RENTAL VALUE AS ELEMENT OF DAMAGES. — When a navigator on a river commits a trespass by permanently mooring on a private shore, thus preventing the owner from renting his property, the rental value thereof is a proper and essential element of damages to be recovered for the trespass. *Wall v. Pittsburgh Harbor Co.*, 667.

See NUISANCE, 1, 2.

WILLS.

1. REFORMATION OF. — Equity will not entertain a bill to reform a will. *Bingel v. Volz*, 64.
2. PAROL EVIDENCE TO VARY. — Parol evidence is not admissible, either to contradict, add to, or explain the contents of a will, even when the consequence is a partial or total failure of the testator's intended disposition. *Bingel v. Volz*, 64.
3. WILLS CONSTRUED ACCORDING TO LANGUAGE USED. — In construing a will the purpose is to arrive if possible, at the intention of the testator, but the intention sought for is not that which existed in the mind of the testator, but that which is expressed by the language of the will, and while in construing a will reference may be made to surrounding circumstances for the purpose of determining the objects of the testator's bounty, or the subject of disposition, and thus place the court, so far as

possible, where it may interpret the language used from the standpoint of the testator at the time he employed it, still surrounding circumstances cannot be resorted to for the purpose of importing into the will any intention which is not there expressed. *Bingel v. Volk*, 64.

6. **CORRECTION OF AMBIGUITIES IN.** — When a testator devises land which he does not own, accurately describing it, a bill in equity will not lie to construe the will on the ground of mistake and to substitute another tract of land owned by the testator in the place of the one devised. *Bingel v. Volk*, 64.
7. **CONSTRUCTION — DESCRIPTION OF LAND.** — When a will devising land contains several descriptions or elements thereof all of which are necessary to the identification of the property, intended to be devised, it will be void if no property of the testator can be found which will correspond with every part of the description; but if the intention as gathered from the will does not make it necessary to satisfy all the elements of the description, or if parts of the description are inconsistent with the other parts, and enough of them are consistent to identify the property, whatever is repugnant may be rejected, and the will enforced under this construction. *Bingel v. Volk*, 64.
8. **CONSTRUCTION — LIMITATION OF ESTATE.** — When a clause in a will contains a limitation on a devise under a certain contingency, and such contingency never has nor never can occur, the clause has no controlling influence in the construction to be put upon the remainder of the will. *Dukes v. Faulk*, 745.
9. **RIGHTS OF PRETERMITTED HEIR.** — When an heir at law has been omitted from the will of his ancestor, the question whether or not the omission to provide for such heir was intentional, or unintentional, and due to accident or mistake, is one of fact, which the pretermitted heir has a right to have submitted to a jury, and a verdict in his favor is conclusive if the testimony offered has any legal tendency to support the conclusion reached. *Estate of Stebbins*, 345.
10. **CONSTRUCTION — PRETERMITTED HEIR.** — When a testator by one clause in his will bequeaths the family Bible to his son if the latter desires it, and if not, it may then be placed in the hands of the testator's granddaughter, naming her, and by another clause he bequeaths his books and clothing to be divided among his brothers and their families, but giving such granddaughter the privilege of first selecting from them, if she so desires, the will cannot be said, as matter of law, to make any provision for such granddaughter so as to conclude her from claiming that the testator unintentionally or by mistake or accident omitted to provide for her in his will. *Estate of Stebbins*, 345.
11. **PRETERMITTED HEIR — PROOF OF OMISSION.** — Omission to provide for an heir in a will may be shown to be unintentional either by the terms of the will or by extrinsic parol evidence, and the relation of the testator to the objects of his bounty and to the omitted heir, as well as to his intelligence, his mental and physical condition, and the circumstances connected with the making of the will, are all proper matters for the consideration of the jury. *Estate of Stebbins*, 345.
12. **POWER OF SALE — EQUITABLE CONVERSION OF REALTY INTO PERSONALTY.** — A mere power contained in a will to sell real estate does not operate as a conversion of it into personalty, but such power coupled with a direction or command to sell will have that effect. *Fahnestock v. Fahnestock*, 623.

11. **POWER OF SALE — EQUITABLE CONVERSION OF REALTY INTO PERSONALTY.** — When a testator authorizes his executors to sell his real estate and to execute and deliver to the purchaser thereof deeds in fee simple, and it is clear from the face of the will that it was the testator's intention that the power so conferred by him shall be exercised, it will be construed as a direction to sell and will operate as an equitable conversion of the property into realty. *Fahnestock v. Fahnestock*, 623.
12. **POWER OF SALE — EQUITABLE CONVERSION OF REALTY INTO PERSONALTY.** — A mere power contained in a will to sell real estate does not operate as a conversion of it into personalty, but when it plainly appears from the will that it was the testator's intention that this power should be exercised, and that effect cannot be given to material provisions without its exercise, an equitable conversion of the property is as effectually accomplished by the will, as if it contained a positive direction to sell. *Fahnestock v. Fahnestock*, 623.
13. **POWER OF SALE — EQUITABLE CONVERSION OF REALTY INTO PERSONALTY.** — When a will contains a power given to the executors to sell the estate, and it is also apparent from its face that the testator intended that his estate real and personal should be converted into money for distribution or investment and the payment of interest and income to his beneficiaries as directed, the will itself will work an equitable conversion of the whole estate into personalty, although it also provides that such beneficiaries may become purchasers of his real estate as directed, and receive conveyances therefor from the executors, as this latter provision is only additional evidence of an intention on the part of the testator that the beneficiaries should take no title except by purchase from the executors. *Fahnestock v. Fahnestock*, 623.
14. **POWER OF SALE — FAILURE TO EXERCISE.** — Failure of executors to exercise a power of sale contained in a will within a fixed time as directed, does not destroy the power. It only takes away the discretion of the executors as to the time of the exercise of the power, and makes it their absolute duty to exercise it upon the expiration of the time fixed. *Fahnestock v. Fahnestock*, 623.

See ATTORNEY AND CLIENT, 3; JUDGES; TRUSTS, 1, 4, 5.

WITNESSES.

See CONTRACTS, 11; EVIDENCE, 5; NEW TRIAL.

WRITS.

See ERROR; MANDAMUS.

WORDS AND PHRASES.

See DEFINITIONS; MAXIMS.



3 6105 063 241 736

